146 U.S. 640

RECORD, CASE No. 14,838.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1364~~. 912

HENRY L. YESLER, PLAINTIFF IN ERROR,

vs.

THE BOARD OF HARBOR LINE COMMISSIONERS ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED SEPTEMBER 11, 1891.

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a THE BOARD OF HARBOR LINE COMMISSION, W. F. PROSSER, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey, Appellant,
vs.
H. L. YESLER, Appellee.

From the superior court of King county to the supreme court of the State of Washington.

1 In the Superior Court of King County, State of Washington.

TUESDAY, *October* 28, 1890.

H. L. YESLER
vs.
THE BOARD OF HARBOR LINE COMMISSION, W. F. PROSSER, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey. } No. 9452.

The State of Washington to the Harbor Line Commission and to W. F. Prosser, Eugene Semple, H. F. Garretson, Frank H. Richards, and D. C. Guernsey, and each of you, Greeting:

Whereas J. D. Lowman, of the city of Seattle, lately in our court, at the city of Seattle, on this 28th day of October, 1890, represented that he, H. L. Yesler, has lived in the city of Seattle upwards of thirty years; that he is now and has been for thirty years last past the owner of the following-described property, to wit: The premises commonly known as the Yesler wharf and dock and the upland inside of and connected with said wharf and dock; that said property abuts upon the shores of Elliott bay; that more than thirty years ago he, in aid of commerce and navigation, caused to be constructed in front of and to the westward of said premises and extending into Elliott bay a wharf and dock at large expense, to wit, at the expense altogether of one hundred thousand dollars; that he at large expense for many years prior to June 6th, 1889, maintained and kept
2 up said wharf and docks in aid of commerce and navigation; that the fire which occurred on the 6th day of June, 1889, and which destroyed the city of Seattle destroyed said wharves and docks; that immediately thereafter he caused said wharves and docks to be rebuilt at large expense, to wit, at the expense of fifty-six thousand dollars, and has ever since maintained said wharves and docks and now maintains the same; that said wharves and docks are necessary aids to commerce and navigation and are largely used and have been largely used in building up and promoting the commerce of the city of Seattle and of the State of Washington; that under and by virtue of the act of the legislature of the State of Washington approved March 26th, 1890, and entitled "An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington," he is entitled, as he believes, to the privilege of purchasing the improvements made by him as

aforesaid upon the shore in front of the upland; that said Harbor Line Commission are about to take final action in the location and establishing of the harbor lines within the limits of the city of Seattle; that, as he is informed and believes, said commission propose and are about to locate and establish such harbor lines in such a way as to include within such harbor lines his improvements hereinbefore mentioned; that the extension of the harbor
3 lines over said improvements is an attempt on the part of the said Harbor Line Commission to exercise authorized power and to do an act which is not within the jurisdiction of the said Harbor Line Commission; that said Harbor Line Commission have not authority or jurisdiction under the laws of the State of Washington, as he is advised and believes, to embrace or include within the harbor lines to be located and established in front of the city of Seattle the wharves, docks, or other improvements made thereon; that after the fire of June 6th, 1889, he rebuilt at large expense as aforesaid the wharves and docks above mentioned, and did so upon the faith of protection afforded to him by the act of the legislature approved March 26th, 1890, above mentioned; that if the Harbor Line Commission aforesaid are not prevented by a writ of prohibition from this honorable court from extending the so-called harbor lines over the wharves and docks aforesaid the said commission will so extend said lines and thus deprive him of the use and benefit of his said wharves and docks and cloud his title to the same in such a manner as greatly to embarrass and hinder the plaintiff in the legitimate use of his said property:

Now, you, the said Harbor Line Commission aforesaid, and the said W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, well knowing the premises and contriving, as it is said, the said H. L. Yesler unjustly to aggrieve and
4 oppress, have attempted and are about to locate, establish, and extend the harbor lines in the harbor of the city of Seattle over and in such a way as to include the above-mentioned premises of the said H. L. Yesler in contempt of us, against the laws and customs of our said State and to the manifest damage, prejudice, and grievance of the said H. L. Yesler.

Wherefore the said H. L. Yesler has prayed relief and our writ of prohibition in that behalf. We, therefore, being willing that the laws and customs of our said State should be observed, and that our citizens should in nowise be oppressed, do command you and each of you that you desist and refrain from any future proceedings in locating, establishing, and extending the said harbor lines in the harbor of the city of Seattle over said premises or in such a manner as to embrace and include the same or any part thereof within the harbor lines of the city of Seattle, and from filing any plat thereof in the office of the secretary of state or duplicate thereof in the office of the clerk of the city of Seattle, until the 20th day of November, 1890, and until the further order of this court thereon, and that you show cause before our said court, at the time last aforesaid, at the court-room of this court, in the city of Seattle, at the hour of 9.30 a. m. on that day, why you should not be absolutely

restrained and prohibited from the aforesaid acts and any other proceedings in such matter.

And have you then and there this writ.

I. J. LICHTENBERG,
Judge of said Court.

5 Dated at the city of Seattle this 28th day of October, 1890.

I, J. H. McGraw, sheriff of King county, State of Washington, do hereby certify that I received the annexed writ of prohibition on the 28th day of October, 1890, and that I personally served the same on the same day on W. F. Prosser, as chairman of the Harbor Line Commission in said writ named and as a member of said Harbor Line Commission, by delivering to him, said W. F. Prosser, personally, in said King county, on the 28th day of October, 1890, two duly certified copies of said writ.

I further hereby certify that at said time and place I served said writ upon Eugene Semple and D. C. Gurnsey, as members of said Harbor Line Commission, by delivering to each of them personally a duly certified copy of said writ.

Dated at Seattle this 29th day of October, 1890.

J. H. McGRAW, *Sheriff.*
LICHTENBERG, *Judge.*

Entered Journal 11, page 203.

6 In the Superior Court of King County, State of Washington.

STATE OF WASHINGTON, } *ss:*
County of King, }

J. D. Lowman, of the city of Seattle, in the county of King, being first duly sworn, says: That he is the attorney-in-fact of H. L. Yesler; that said H. L. Yesler has lived in the city of Seattle upwards of thirty years; that he is now and has been for thirty years last past the owner of the following-described property, to wit, the property commonly known as Yesler's wharf and dock and the upland abutting on the shore upon which said wharf and dock were constructed; that said property abuts upon the shores of Elliott bay; that more than thirty years ago said Yesler, in aid of commerce and navigation, caused to be constructed in front of and to the westward of said premises and extending into Elliott bay a wharf and dock at large expense, to wit, at the expense of one hundred thousand dollars; that said Yesler, at large expense, for many years prior to June 6th, 1889, maintained and kept up said wharf and docks in aid of commerce and navigation; that the fire which occurred on the 6th day of June, 1889, and which destroyed the city of Seattle destroyed said wharves and docks; that immediately thereafter said Yesler caused said wharves and docks to be rebuilt at large expense, to wit, at the expense of fifty-six thousand dollars, and has ever since maintained said wharves and docks and now maintains the same;

7 that said wharves and docks are necessary aids to commerce and navigation and are largely used and have been largely

used in building up and promoting the commerce of the city of Seattle and of the State of Washington.

That under and by virtue of the act of the legislature of the State of Washington approved March 26th, 1890, and entitled "An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington," affiant is entitled, as affiant believes, to the privilege of purchasing the space upon which the improvements — made by him aforesaid upon the shore in front of the upland. Affiant further says that under and by virtue of the act of the legislature of the State of Washington approved March 28th, 1890, entitled "An act to create a board of harbor-line commissioners," prescribing their duties and compensation, the governor of the State appointed as such commissioners W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey; that the members of said Harbor Line Commission have duly qualified as such and entered upon the discharge of their duties as such commission and are about to take final action in the location and establishing of the harbor lines within the limits of the city of Seattle; that, as affiant is informed and believes, said commission propose and are about to locate and establish such harbor lines in such a way as to include within such harbor lines
8 a large part of the improvements of affiant hereinbefore mentioned; that the extension of the harbor lines over said improvements is an attempt on the part of the said Harbor Line Commission to exercise unauthorized power and to do an act which is not within the jurisdiction of the said Harbor Line Commission; that said Harbor Line Commission has not authority or jurisdiction under the laws of the State of Washington, as affiant is advised and believes, to embrace or include within the harbor lines to be located and established in front of the city of Seattle the wharves, docks, or other improvements made therein; that after the fire of June 6th, 1889, the said Yesler rebuilt, at large expense as aforesaid, the wharves and docks above mentioned, and did so upon the faith of protection afforded to said Yesler by the act of legislature approved March 26th, 1890, above mentioned; that if the Harbor Line Commission aforesaid are not prevented by a writ of prohibition from this honorable court from extending the so-called harbor lines over the wharves and docks of said Yesler the said commission will so extend said lines and thus deprive said Yesler of the use and benefit of his said wharves and docks without compensation or due process of law and cloud his title to the same in such a manner as greatly to embarrass and hinder the plaintiff in the legitimate use of his said property.

Affiant makes this affidavit for the purpose of procuring a
9 writ of prohibition to be issued out of this court to the said Harbor Line Commissioners, to wit, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey, and to each of them, to prohibit and restrain them and each of them from extending, locating, or establishing the harbor lines in front of the city of Seattle or in the harbor of the city of Seattle over the wharves and docks of the said H. L. Yesler or any part thereof and

from filing the plat thereof in the office of secretary of state or the duplicate thereof in the office of the clerk of the city of Seattle. Affiant further says that he has no remedy at law or equity save and except the writ herein applied for.

Wherefore he prays for the issuance of such writ and for such other and further relief as he may be entitled to.

J. D. LOWMAN.

Subscribed and sworn to before me this 28th day of October, 1890.

J. C. HAINES,
Notary Public in and for the State of Washington,
Residing at Seattle.

(Indorsed:) Filed Oct. 28, A. D. 1890. M. M. Holmes, clerk.

10 In the Superior Court of King County, State of Washington.

SATURDAY, *November* 8, 1890.

H. L. YESLER
vs.
BOARD OF HARBOR LINE COMMISSIONERS, W. F. PROSSER, Eugene Semple, F. H. Richards, H. F. Garretson, and D. C. Gurnsey. } No. 9452.

Ordered by the court that this cause be, and the same is hereby, set for trial Thursday, November 20, 1890.

LICHTENBERG, *Judge.*

Entered Journal 11, page 331.

11 In the Superior Court of King County, State of Washington.

TUESDAY, *November* 18, 1890.

H. L. YESLER
vs.
THE BOARD OF HARBOR LINE COMMISSIONERS *et al.* } No. 9452. Continued.

Ordered by the court that this cause be, and the same is hereby, continued until Thursday, December 18, 1890.

LICHTENBERG, *Judge.*

Entered Journal 11, page 443.

12 STATE OF WASHINGTON, } ss:
County of King, }

In Superior Court, State of Washington.

STATE OF WASHINGTON on the Relation of H. L. YESLER, Plaintiff,
vs.
THE BOARD OF HARBOR LINE COMMISSION, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank H. Richards, D. C. Gurnsey; Allen Weir, Sec'y of State of the State of Washington, and Henry W. Miller, City Clerk of the City of Seattle, Defendants. } No. 9452. Motion.

Come now the above-named defendants and move the court to quash the writ of prohibition heretofore issued out of said court in said action for the reason—

First. That said court has no jurisdiction in the premises.

Second. That the petition filed herein does not state facts authorizing the issuance of said writ.

W. C. JONES, *Attorney General.*
EUGENE SEMPLE AND
WILEY, HALE & SCOTT,
Of Counsel for Defense.

(Indorsed:) Filed Nov. 21, 1890. M. M. Holmes, clerk, by H. H. Smith, deputy.

13 In the Superior Court of King County, State of Washington.

THURSDAY, *December* 18, 1890.

H. L. YESLER
vs.
THE BOARD OF HARBOR LINE COMMISSION, W. F. PROSSER, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey. } No. 9452.

Now, on this day, this cause comes on for hearing in open court, plaintiff being present in person and accompanied by his counsel, Thomas Burke, J. C. Haines, and T. R. Shepard, and Attorney General W. C. Jones appearing for the defendants. The trial proceeds by the argument of the respective counsel until, the hour of adjournment having arrived, by consent of parties, it is ordered by the court that this cause be, and the same is hereby, continued until 9.30 o'clock a. m. to-morrow.

I. J. LICHTENBERG, *Judge.*

Entered Journal 15, page 132.

14 In the Superior Court of King County, State of Washington.

FRIDAY, *December* 19, 1890.

H. L. YESLER
vs.
THE BOARD OF HARBOR LINE COMMISSION, W. F. PROSSER, Eugene Semple, Frank W. Richards, H. F. Garretson, and D. C. Guensey. } No. 9452.

And now, on this day, this cause comes on for further hearing, plaintiff being present in person and accompanied by his counsel, Thomas Burke, J. C. Haines, and T. R. Shepard, and defendants present by their counsel, Attorney General W. C. Jones. The hearing is continued by the further argument of the respective counsel; whereupon, by consent of parties, it is ordered by the court that this cause be, and the same is hereby, continued until 1 o'clock p. m. to-morrow.

LICHTENBERG, *Judge.*

Entered Journal 15, page 139.

15 In the Superior Court of King County, State of Washington.

SATURDAY, *December* 20, 1890.

H. L. YESLER
vs.
THE BOARD OF HARBOR LINE COMMISSION, W. F. PROSSER, Eugene Semple, Frank W. Richards, H. F. Garretson, and D. C. Guernsey. } No. 9452.

And now, the hour of 1.30 o'clock p. m. having arrived, plaintiff being present in person and accompanied by his counsel, Thomas Burke, J. C. Haines, and T. R. Shepard, and Attorney General W. C. Jones appearing for the defendants, the hearing continues by the further argument of the respective counsel until the close thereof.

Whereupon the court takes the above-entitled cause under advisement.

LICHTENBERG, *Judge.*

Entered Journal 15, page 146.

16 In the Superior Court of King County, State of Washington.

FRIDAY, *January* 23, 1891.

H. L. YESLER
vs.
BOARD OF HARBOR LINE COMMISSIONERS. } No. 9452. Motion Overruled.

Now, on this day, this cause comes on for hearing on defendants' motion to quash the writ of prohibition heretofore issued out of said court in said action, and, after argument of counsel and being fully advised in the premises, it is ordered by the court that said motion

be, and the same is hereby, overruled; and it is further ordered by the court that a peremptory writ of prohibition issue, prohibiting defendants from further acting until provision is first made by legislation for compensation for property damaged in accordance with the opinion filed herein; to which ruling of the court defendant except, and said exceptions are allowed.

I. J. LICHTENBERG, *Judge.*

Entered Journal 17, page 133.

17 In the Superior Court of King County, State of Washington.

SATURDAY, *February* 7, 1891.

H. L. YESLER, Relator,
vs.
THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank W. Richards, H. F. Garretson, and D. C. Guernsey, Respondents.
No. 9452. Judgment.

This cause was duly brought to a hearing in this court before the Hon. I. J. Lichtenberg, judge of said court, on Dec. 18, 1890, upon the motion theretofore made and filed by the attorney general of the State of Washington in behalf of the above-named respondents to quash the alternative writ of prohibition theretofore issued, and at the opening of the arguments upon said motion it was formally stipulated and agreed between the parties, by their respective counsel in the cause, that for all purposes herein said motion to quash should be taken and deemed as both a motion to quash the alternative writ and a demurrer to the affidavit upon which the application for the alternative writ was made and granted, and that upon the decision to be made upon said motion by this court final judgment should be entered in accordance with the decision of said motion. Thereupon the court heard arguments by the Hon. W. C. Jones, attorney general of the State of Washington, and Messrs.
18 Eugene Semple, John Wiley, Julius F. Hale, and William T. Scott, all of counsel for said respondents, in support of said motion to quash, and by Messrs. Thomas Burke, J. C. Haines, and Thomas R. Shepard, all of counsel for said relator, in opposition to the granting of said motion, and, the court having duly considered said motion and being fully advised in the premises, thereupon, on Jan'y 23, 1891, duly rendered its decision herein, whereby said motion to quash the alternative writ was denied and judgment was ordered to be entered in favor of said relator making said writ absolute.

Wherefore, on motion of Mr. Thomas Burke, attorney for said H. L. Yesler, the relator in this cause, it is ordered, considered, and adjudged by the court now here that the alternative writ of prohibition issued by this court in this cause on Oct. 28, 1890, commanding and prohibiting the above-named respondents herein, The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey, as is

fully set forth in said alternative writ on file and of record herein, be, and the same hereby is, made absolute and final, and that this court does hereby command said respondents and each of them absolutely and finally that they and each of them desist and refrain from any future proceedings in locating, establishing, and ex-
19 tending the harbor lines mentioned and referred to in the affidavit of J. D. Lowman, made and filed herein on Oct. 28, 1890, and in said alternative writ issued thereon, over, across, and in front of the premises of said relator herein, H. L. Yesler, mentioned in said alternative writ, to wit, the premises commonly known as Yesler's wharf and dock and the upland abutting on the shore of Elliott bay upon which said wharf and dock were constructed, and through the buildings thereon upon the shore of Elliott bay and in the harbor of the city of Seattle, in said King county, or in such a manner as to embrace and include said premises and improvements or any part thereof within the harbor lines of said city of Seattle, until compensation shall be ascertained and paid as required by law to said relator, H. L. Yesler, for the taking or damaging of his said property and improvements thereby.

Done in open court this Feb'y 7, 1891.

I. J. LICHTENBERG, *Judge.*

Entered Journal 17, page 291.

20 In the Superior Court of King County, State of Washington.

MONDAY, *February* 9, 1891.

STATE OF WASHINGTON on the Relation of H. L. YESLER *vs.* THE BOARD OF HARBOR LINE COMMISSION, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank H. Richards, D. C. Gurnsey, Allen Weir, Sec'y of the State of Washington, and Henry W. Miller, City Clerk of the City of Seattle.	No. 9452. Notice of Appeal.

Now, on this day, the defendant Eugene Semple comes into open court and gives notice of appeal from the rulings herein rendered to the supreme court of the State of Washington.

I. J. LICHTENBEBG, *Judge.*

Entered Journal 17, page 319.

21 In the Superior Court of King County, State of Washington.

SATURDAY, *April* 25, 1891.

HENRY L. YESLER
vs.
BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey. } No. 9452. Notice of Appeal.

To Henry L. Yesler and to Burke, Shepard & Woods and to J. C. Haines, attorneys for plaintiff:

You and each of you will please take notice that the above-named defendants and each of them hereby appeal to the supreme court of the State of Washington from the judgment made and entered in the above-entitled cause on the 7th day of February, 1891, and from each and every order made in said cause during the progress thereof, and assign the following errors:

First. The court had no jurisdiction in the premises.

Second. The judgment is against the law.

Third. The judgment is against the facts as admitted by the demurrer.

W. C. JONES, *Attorney General*,
EUGENE SEMPLE,
WILEY, HALE & SCOTT,
Of Counsel for Defendant-.

(Indorsed:) Received copy of the above notice this 9 day of Feb., 1891. I. J. Lichtenburg, judge.

Entered Journal 21, page 362.

22 In the Superior Court of King County, State of Washington.

H. L. YESLER
vs.
THE BOARD OF HARBOR LINE COMMISSION, W. F. PROSSER, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey. } No. 9452.

STATE OF WASHINGTON, *County of King*, } *ss*:

I, W. B. Spencer, county clerk of King county and *ex officio* clerk of the superior court of said county, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on appeal to transmit to the supreme court.

In witness where- I have hereunto set my hand and affixed the seal of said superior court this 5 day of May, 1891.

[Seal of Superior Court of King County, Washington.]

W. B. SPENCER, *Clerk*

(Indorsed:) No. 216. Filed May 7, 1891. C. S. Rinehart, clerk.

23 In the Supreme Court of the State of Washington.

FRIDAY, *June* 19, 1891.

BOARD OF HARBOR LINE COMMISSIONERS, Appellants,
vs.
H. L. YESLER, Appellee.
} No. 216.

This cause coming on to be heard by the court on the transcript of the record of the superior court of King county and upon the argument of counsel, the cause was submitted and taken under advisement by the court.

Entered Record 1, page 383.

24 STATE OF WASHINGTON *ex Rel.* H. L. YESLER, Respondent,
vs.
WILLIAM F. PROSSER *et al.*, Appellant-.
} No. 216.

The most important questions in this case are the same as those discussed and covered by the opinion in the case of Eisenbach *vs.* Hatfield, decided at the last session of this court.

Yet in view of the immense interests involved in the principles therein announced we have again gladly listened to the able arguments of counsel made before us and have carefully examined the exhaustive briefs filed and again reviewed all of the questions decided in the case above cited, and it is only necessary for me to say that the opinion of the court has not been changed by such re-examination. The court is still of the opinion that as against the State a lit-oral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide. The somewhat careful examination which I have given this case has confirmed my opinion that at common law the sovereign power (resting in England in Parliament) could take such lands without compensation and absolutely exclude the lit-oral proprietors from any rights thereto. In fact, such is conceded to be the power of Parliament by nearly all of the courts. Even those which have taken the strong-
25 est ground against the doctrine of the case above cited have admitted such to be the rule. Note the argument of Chancellor Zabriskie in his dissenting opinion, 34 N. J. Law, 554. While conceding this, they say Parliament has this power because it is all-powerful and can legislate as it pleases. This is true; but why is it true? Simply because in it is embodied the sovereign power.

In my opinion, the same power vested in Parliament and King in England is here vested in the people, who are fully as much sovereign here as Parliament and King there. Here the people of a State are absolutely sovereign, except as controlled by the Constitution of the United States, and I do not think that it can be successfully contended that the powers of the people of the States have been thus controlled as to the questions here involved. I am unable to find any clause of the Constitution of the United States looking to

such control, and as I read the decisions of the United States Supreme Court it has expressly decided that the States are in nowise controlled in this matter. Acting within their sovereign power as above recognized, the people of this State in forming a constitution saw fit to assert the title of the State to the lands in question, and having done so they are the only power that can interfere with such title.

26 But it is said that, while such assertion of title is made in the Constitution, it is so made subject to vested rights of the riparian owner, to be asserted in the courts. I am of the opinion that this vested right cannot be held to be such as is incident to the riparian owner simply as such, but must be held to apply only to some special right held by such owner by way of improvements made under express or implied license from the representative of the sovereign power. To hold that the former was intended would practically destroy the title of the State, and would therefore be inconsistent with the assertion of such title, while the latter construction will give force to every word and make the provision in its entirety a consistent one. When the people say that they assert the State's title it must be held to mean the entire and exclusive title. Of course the rights of the State, as above stated, are subject to the paramount right of the United States to regulate commerce and navigation, as to which I shall say a word later on.

The doctrine of the case of Eisenbach *vs.* Hatfield, above cited, must obtain, and under it the rights of the parties hereto must be determined. It will thus be seen that the petitioner has no rights to the land in controversy, and at the most the only vested right he has is in the wharf constructed thereon; and for the purposes of this case I shall assume (though we do not now decide that question) that the petitioner has such a right in such wharf; that it could only be taken from him after compensation paid therefor; but will this right aid him in this controversy? Will the fact that he has a right to be compensated for his said improvements allow him to prevent the carrying out of a great State policy in the establishment of harbor lines? Can it be contended that this work must stop or that the line must be laid around the several wharves which have been erected by riparian owners? I think all these questions must be answered in the negative.

27

The riparian proprietor, as we have seen, has no interest in the land, but simply in the wharf on the land, and, this being so, it cannot be said that simply including the land under the wharf within the harbor lines is such a taking or damaging of the wharf as will entitle the owner to compensation. It does not follow from such including within the harbor lines that the State has or ever will interfere with his ownership or possession of said wharf. If his property is neither taken nor damaged the only ground upon which he can ask the interposition of the courts is that a cloud is about to be cast upon his title. Upon this question I am of the opinion that his title is not of a nature to be clouded, being only a right to the structure upon the land, without any right in the land itself; but, even if it were, the proceedings

complained of could constitute no cloud thereon; for if the contention of petitioner is correct the Harbor Line Commission could
28 not lawfully act until legislation had been had providing a method by which the vested rights of all riparian owners who had wharfed out could be protected.

And if this is so, then their want of authority to act is known to every one and must be held to be apparent from the face of the proceedings, and therefore their acts could not constitute a cloud. If, on the other hand, they have authority to act at all in advance of such legislation they must be held to have authority to lay their lines across the wharf of petitioner and all others similarly situated. I think that the argument of counsel that this legislation is opposed to that of Congress enacted upon the subject of navigation and harbor lines cannot be sustained. All such legislation must be presumed to be in the interest of commerce and navigation until the contrary appears; besides, the United States, by its proper officers, is the only party that could interfere in such a case.

The extraordinary writ of prohibition should only be granted in a clear case and when no other remedy is available; and I am of the opinion that petitioner has no cause of complaint, and, if he has, I am not satisfied that the ordinary proceedings in law or equity will not ultimately completely protect his rights. The judgment must be reversed and the cause remanded, with instructions to dismiss the petition.

JOHN P. HOYT, *J.*

We concur.

T. J. ANDERS, *C. J.*
ELMON SCOTT, *J.*
R. O. DUNBAR, *J.*

29 I concur in the disposition of this case, as I look upon the threatened action of the Board of Harbor Line Commissioners in the filing of a map of the harbor line of the city of Seattle as a clearly legitimate exercise of the power of the State to regulate and control the harbor within its limits to the extent of fixing the point beyond which wharves must not extend.

In Commonwealth *vs.* Alger, 7 Cush., 53, the like action was upheld, although the soil beneath the wharf complained of was the property of the appellant in fee under the Massachusetts ordinance of 1647. As to the consequences which may follow through the action of the tide land commissioners, I think them too remote for adjustment or discussion in the present proceedings.

T. L. STILES, *J.*

(Endorsed:) No. 216. Filed July 8, 1891. C. S. Reinhart, clerk.

30 In the Supreme Court of the State of Washington.

WEDNESDAY, *July* 8, 1891.

STATE OF WASHINGTON *ex Rel.* H. L. YESLER, Respondent,
vs.
BOARD OF HARBOR LINE COM., WM. F. PROSSER, *et al.*, Appellants.
} No. 216. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of King county and upon the argument of counsel, and the court being fully advised in the premises and having fully considered the same and having filed its opinion in writing, it is now, on this 8th day of July, A. D. 1891, on motion of W. C. Jones and Eugene Semple, of counsel for appellant, considered, adjudged, and decreed that the judgment of the lower court be, and the same is hereby, reversed with costs, and that the said W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey have and recover of and from the said H. L. Yesler the costs of this action, taxed and allowed at ninety-seven & $\frac{65}{100}$ dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

Entered Record 1, page 402.

31 In the Supreme Court of the State of Washington.

HENRY L. YESLER, Relator and Appellee,
vs.
THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey, Respondents and Appellants.
} No. —. Petition for Allowance of Writ of Error, etc.

To the Hon. T. J. Anders, chief justice of the supreme court of the State of Washington:

Now comes Henry L. Yesler, the above-named relator and appellee in this court, and petitions the hon. chief justice of this court for an allowance of a writ of error from the Supreme Court of the United States to this court to bring up for review by the Supreme Court of the United States the judgment of this court in the above-entitled cause rendered and entered herein under date of July 8, 1891, whereby this court adjudged and directed that the judgment of the superior court of King county in said cause must be reversed and the cause remanded with instructions to dismiss the petition for the writ of prohibition granted and issued herein by said superior court, and for an order fixing the amount of the security to be filed that the plaintiff in error, said Henry L. Yesler, shall prosecute his said writ of error to effect, and if he fail to make his
32 plea good shall answer all damages and costs if said writ is to operate as a supersedeas pending the hearing of said cause

thereon in the Supreme Court of the United States, or all costs only if said plaintiff in error shall elect to file security such that said writ shall not operate as a supersedeas as aforesaid, and for the allowance of a citation to the adverse parties upon the filing of such writ of error in this court and upon the approval and filing of such security in pursuance of the statute of the United States in such case made and provided.

This petition is based upon the fact that in this cause there is drawn in question the validity of a statute of the United States, and the decision in said judgment of the supreme court of the State of Washington herein is against its validity and adverse to this petitioner; and also upon the fact that in this cause there is drawn in question the validity of an authority exercised under the United States, and the decision in said judgment of the supreme court of the State of Washington herein is against its validity and adverse to this petitioner; and also upon the fact that in this cause there is drawn in question the validity of a statute of the State of Washington on the ground of its being repugnant to the constitution and laws of the United States, and the decision in said judgment of the supreme court of the State of Washington herein is in favor
33 of its validity and adverse to this petitioner; and also upon the fact that in this cause there is drawn in question the validity of an authority exercised under the State of Washington on the ground of its being repugnant to the constitution and laws of the United States, and the decision in said judgment in the supreme court of the State of Washington herein is in favor of its validity and adverse to this petitioner; and also upon the fact that in this cause a title, right, and privilege are claimed under the constitution and statutes of and under authority exercised under the United States, and the decision in said judgment of the supreme court of the State of Washington herein is against such title, right, and privilege specially set up and claimed by this petitioner under said constitution and statutes of and authority exercised under the United States.

And your petitioner will ever pray, etc.

Dated July 17, 1891.

THOMAS BURKE AND
J. C. HAINES,

Attorneys for Henry L. Yesler, Relator and Appellee in This Court.

BURKE, SHEPARD & WOODS, *Of Counsel.*

Filed July 17, 1891.

C. S. REINHART, *Clerk.*

34 In the Supreme Court of the State of Washington.

HENRY L. YESLER, Relator and Appellee,
vs.
THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey, Respondents and Appellants.

No. —. Order Allowing Writ of Error, etc.

Henry L. Yesler, the above-named relator and appellee in this court, having this day filed his petition in writing to the undersigned, chief justice of the supreme court of the State of Washington, for the allowance of a writ of error from the Supreme Court of the United States to this court to bring up for review by the Supreme Court of the United States the judgment of this court in the above-entitled cause rendered and entered herein under date of July 8, 1891, and for an order fixing the amount of the security to be filed that the plaintiff in error, said Henry L. Yesler, shall prosecute his said writ of error to effect, and if he fail to make his plea good shall answer all damages and costs if said writ is to operate as a supersedeas pending the hearing of said cause thereon in the Supreme Court of the United States, or all costs only if said plaintiff in error shall elect to file security such that said writ shall not operate as a superesdeas as aforesaid, and for the allowance
35 of a citation upon the filing of such writ of error in this court and upon the approval and filing of such security, in pursuance of the statute in such case made and provided, and the undersigned having duly considered said matter and being fully advised in the premises:

Now, on motion of said relator's attorneys, it is ordered that said writ of error be, and the same is hereby, allowed; that the amount of the security to be given as aforesaid be, and the same hereby is, fixed at the sum of ten thousand (10,000) dollars if said writ is to operate as a supersedeas as aforesaid, and at the sum of five hundred dollars if said plaintiff in error shall elect to file security such that said writ of error shall not operate as a supersedeas as aforesaid, and that such security be conditioned that the plaintiff in error, said Henry L. Yesler, shall prosecute his said writ of error to effect, and if he fail to make his plea good shall answer all damages and costs if said writ is to operate as a supersedeas as aforesaid, or all costs only if said writ is not to operate as a supersedeas as aforesaid, and that the form of such security and the sureties thereon be approved before filing the same by the undersigned, chief justice of this court, and that upon the issuing and filing of said writ of error and the approval and filing of such security as aforesaid said writ of error shall operate as a supersedeas, and that a citation issue thereupon to the adverse parties, in pursuance of the statute
36 of the United States in such case made and provided.

Done at Olympia, in the State of Washington, this 17th day of July, 1891.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

Filed July 17, 1891. Entered p. 409, Record, vol. 1.

37 In the Supreme Court of the State of Washington.

HENRY L. YESLER, Relator and Appellee, *v.* THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank H. Richards, H. P. Garretson, and D. C. Guernsey, Respondents and Appellants.	No. —. Supersedeas Bond.

Know all men by these presents that we, the above-named Henry L. Yesler, of Seattle, in the county of King and State of Washington, principal, and Minnie G. Yesler, his wife, and Ed. L. Terry and Jennie E. Terry, his wife, and B. F. Shaubut and Cornelia A. Shaubut, his wife, of Seattle, in the county of King and State of Washington, are held and firmly bound unto the above-named The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Gurnsey, in the sum of ten thousand dollars ($10,000), to be paid to the said The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C.Guernsey; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of July, in the year of our Lord one thousand eight hundred and ninety-one.

38 Whereas the above-named Henry L. Yesler has prosecuted a writ of error for an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Washington, which judgment was rendered and entered in said last-named court on July 8, 1891:

Now, therefore, the condition of this obligation is such that if the above-named Henry L. Yesler shall prosecute said writ of error to effect and if he fail to make his plea good shall answer all damages and costs, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HENRY L. YESLER. [SEAL.]
MINNIE G. YESLER. [SEAL.]
ED. L. TERRY. [SEAL.]
JENNIE E. TERRY. [SEAL.]
B. F. SHAUBUT. [SEAL.]
CORNELIA A. SHAUBUT. [SEAL.]

In presence of—
BERTIE HOFF RICHTER,
H. L. Y.
M. G. Y.
O. C. McGILVRA,
As to all.
I. A. NADEAU,
As to Ed. L. T.
B. F. S.
ANNA RASMUSEN,
J. E. T.
M. H. YOUNG,
C. A. S.

STATE OF WASHINGTON, } ss:
County of King, }

Ed. L. Terry and B. F. Shaubut, being duly sworn, each for himself deposes and says: I am one of the persons named in and who signed and sealed the foregoing supersedeas bond as a surety; I am
39 a resident of the State of Washington, and am not a counselor or attorney at law, sheriff, clerk of the superior court of said State or other officer of said court, and I am worth the amount specified in the foregoing bond, to wit, the sum of ten thousand dollars, over and above all debts and liabilities and exclusive of property exempt from execution.

ED. L. TERRY.
B. F. SHAUBUT.

Subscribed and sworn to before me this July 24th, 1891.
O. C. McGILVRA,
Notary Public in and for the State of Washington, Residing at Seattle.

On reading and filing the foregoing bond and on motion of the above-named relator's attorneys it is ordered that said bond, as to both the form thereof and the sureties thereon, be approved, and the same hereby is approved, as a supersedeas bond upon the writ of error herein mentioned, and that upon the filing of said bond said writ of error operate as a supersedeas in the above-entitled action.

Done at Olympia, in the State of Washington, this 24th day of July, 1891.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

Filed July 25, 1891.

C. S. REINHART, *Clerk.*

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry L. Yesler, relator and appellee in the said court, and The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey, respondents and appellants in the said court, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, and which judgement of the said supreme court of the State of Washington was rendered and entered therein in said cause under date of July 8, 1891, a manifest error hath happened,

41 to the great damage of the said Henry L. Yesler, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of September next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and Constitution of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of July, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

Issued July 24th, 1891.

41½ [Endorsed:] No. 216. In the supreme court of the State of Washington. Henry L. Yesler (relator and appellee), plaintiff

in error, *v.* The Board of Harbor Line Commissioners, W. F. Prosser *et al.* (respondents and appellants), defendants in error. Writ of error from the Supreme Court of the United States. The within writ of error is allowed by me this July 17, 1891. T. J. Anders, chief justice of the supreme court of the State of Washington. Filed July 25, 1891. C. S. Reinhart, clerk. —— ——, dept.

42 *Citation.*

THE UNITED STATES OF AMERICA :

To The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey, Greeting :

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of September, eighteen hundred and ninety-one, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Washington, at Olympia, in said State, wherein Henry L. Yesler is plaintiff in error and you, The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey aforesaid, are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of July, in the year of our Lord one thousand eight hundred and ninety-one.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

42½ [Endorsed:] No. 216. In the supreme court of the State of Washington. Henry L. Yesler (relator and appellee), plaintiff in error, *v.* The Board of Harbor Line Commissioners, W. F. Prosser *et al.* (respondents and appellants), defendants in error. Citation.

[Endorsed:] Service of a copy of the within citation is hereby admitted at Tacoma, Washington, this 10th day of August, 1891. Wm. F. Prosser, Eugene Semple, D. C. Guernsey, H. F. Garrettson, F. H. Richards, the Board of Harbor Line Commissioners.

[Endorsed:] Copy of within citation received at Olympia, Washington, August 8, 1891. W. C. Jones. att. gen'l, State of Washington. Service of a copy of the within citation is hereby admitted. Seattle, Washington, August 14, 1891. Wily, Hale & Scott, attorney- for defendants in error.

43 In the Supreme Court of the State of Washington.

HENRY L. YESLER (Relator and Appellee), Plaintiff in Error,
v.
THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey (Respondents and Appellants), Defendants in Error.

No. 216. Affidavit of Service.

STATE OF WASHINGTON, *County of King,* } *ss.*:

W. H. Carson, being sworn, says: I reside in the city of Seattle, in said King county, and am a clerk in the law office of Burke, Shepard & Woods, attorneys and of counsel for Henry L. Yesler, the above-named relator and appellee in this action, plaintiff in error in the proceedings upon the writ of error hereinbelow mentioned. On August 1, 1891, at Spokane, in the State of Washington, the writ of error from the Supreme Court of the United States sued out by said plaintiff in error to review the judgment of this court in this action and the supersedeas bond on said writ of error, which writ and bond are now on file in this court, were duly served on Mr. W. C. Jones, attorney general of the State of Washington and attorney for The Board of Harbor Line Commissioners, the above-named respondents and appellants in this action, defendants in error in said proceedings upon said writ of error, by delivery of a copy of said writ and a copy of said bond to said W. C. Jones, as appears by his written acknowledgement of receipt of a copy of said writ on said date indorsed on a copy of said writ, which is hereto annexed, marked "A," and by his written acknowledgement of
44 receipt of a copy of said bond on said date indorsed on a copy of said bond, which is hereto annexed, marked "B;" and on August 8, 1891, at Olympia, in the State of Washington, I duly served the citation, signed by the Honorable T. J. Anders, chief justice of the supreme court of the State of Washington, in this action, under date of July 27, 1891, to which original citation this affidavit is annexed, upon said W. C. Jones, attorney for said defendants in error, by then and there delivering to and leaving with him personally a true copy of said citation and of the whole thereof, his written acknowledgement of the receipt of which copy on said date is indorsed on said original citation. On July 29, 1891, at Seattle, in the State of Washington, I duly served said writ of error and said supersedeas bond on Messrs. Wiley, Hale & Scott, attorneys for said defendants in error, by then and there delivering a true copy of said writ and of the whole thereof and a true copy of said bond and of the whole thereof to and leaving the same with Mr. John Wiley, who was then and there known to me to be a member of said firm of Wiley, Hale & Scott, personally, his written acknowledgement in the name of his said firm of said service of which writ on said date is indorsed on said annexed copy of said writ and his

written acknowledgement in the name of his said firm of said service of which bond on said date is indorsed on said annexed copy of said bond; and on August 14, 1891, at said Seattle, I duly served said citation on said Wiley, Hale & Scott, attorneys for the said defendants in error, by then and there delivering a true copy of said citation and of the whole thereof to and leaving the same with Mr. William T. Scott, who was then and there known to me to be a member of said firm of Wiley, Hale & Scott, his written acknowledgement in the name of his said firm of said service of which citation on said date is indorsed on said citation, hereto prefixed.

45 On July 29, 1891, at said Seattle, I duly served said writ of error and said supersedeas bond on Mr. Eugene Semple, a member of said The Board of Harbor Line Commissioners and one of said defendants in error and one of the attorneys for said defendants in error, by then and there delivering to and leaving with him personally a true copy of said writ and of the whole thereof and a true copy of said bond and of the whole thereof, his written acknowledgement of said service of which writ on said date is indorsed on said annexed copy of said writ and his written acknowledgement of said service of which bond on said date is indorsed on said annexed copy of said bond. On August 10, 1891, at Tacoma, in the State of Washington, I duly served said writ of error, said supersedeas bond, and said citation on the above-named defendants in error, William F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey, who were then and there known to me to be the members and all the members of said The Board of Harbor Line Commissioners, by then and there delivering to and leaving with each of them personally a true copy of said writ of error and of the whole thereof and a true copy of said citation and of the whole thereof and then and there delivering a true copy of said bond and of the whole thereof to and leaving the same with said William F. Prosser personally, who was then and there known to me to be the chairman of said The Board of Harbor Line Commissioners, as such chairman and for all said members of said board, the written acknowledgement by each of said members of said board of said service of which writ upon him on said date is indorsed on said annexed copy of said writ and the written acknowledgement by each of said members of said board of said service of which citation upon him on said date is indorsed on said citation hereto prefixed and the written acknowledgement by said William F.

46 Prosser as chairman of said The Board of Harbor Line Commissioners of said service of which bond is indorsed on said annexed copy of said bond.

W. H. CARSON.

Subscribed and sworn to before me this Aug. 26, 1891.

{ Seal Thomas Burke, Notary Public, State of Washington. Commission Expires Jan. 22, 1894. }

THOMAS BURKE,
Notary Public.

47 "A."

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry L. Yesler, relator and appellee in the said court, and The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey, respondents and appellants in the said court, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, and which judgement of the said supreme court of the State of Washington was rendered and entered therein in said cause under date of July 8, 1891, a mani-

48 fest error hath happened, to the great damage of the said Henry L. Yesler, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of September next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and Constitution of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of July, in the year of our Lord one thousand eight hundred and ninety-one.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States
for the District of Washington.

Issued July 24th, 1891.

48½ [Endorsed:] No. 216. In the supreme court of the State of Washington. Henry L. Yesler (relator and appellee), plaintiff in error, *v.* The Board of Harbor Line Commissioners, W. F. Prosser *et al.* (respondents and appellants), defendants in error. Writ of error from the Supreme Court of the United States. The within writ of error is allowed by me this July 17, 1891. T. J. Anders, chief justice of the supreme court of the State of Washington. Copy.

[Endorsed:] Service of a copy of the within writ is hereby admitted this 29 July, 1891. Eugene Semple, Wiley, Hale & Scott, of attorneys for the respondents. Copy of within writ received August 1, 1891. W. C. Jones, att'y gen'l.

[Endorsed:] Service of a copy of the within writ of error is hereby admitted. Tacoma, Washington, this 10th day August, 1891. F. H. Richards, Wm. F. Prosser, H. F. Garretson, D. C. Guernsey, Eugene Semple, the Board of Harbor Line Commissioners.

49 "B."

In the Supreme Court of the State of Washington.

HENRY L. YESLER, Relator and Appellee, *v.* THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank H. Richards, H. P. Garrettson, and D. C. Guernsey, Respondents and Appellants.	No. —.	Supersedeas Bond.

Know all men by these presents that we, the above-named Henry L. Yesler, of Seattle, in the county of King and State of Washington, principal, and Minnie G. Yesler, his wife, and Ed. L. Terry and Jennie E. Terry, his wife, and B. F. Shaubut and Cornelia A. Shaubut, his wife, of Seattle, in the county of King and State of Washington, are held and firmly bound unto the above-named The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey, in the sum of ten thousand dollars ($10,000), to be paid to the said The Board of Harbor Line Commissioners, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 24th day of July, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Henry L. Yesler has prosecuted a writ of error for an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Supreme Court of the State of Washington, which judgment was rendered and entered in said last-named court on July 8, 1891:

Now, therefore, the condition of this obligation is such that if the

above-named Henry L. Yesler shall prosecute said writ of error to effect and, if he fail to make his plea good, shall answer
50 all damages and costs, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HENRY L. YESLER. [SEAL.]
MINNIE G. YESLER. [SEAL.]
ED. L. TERRY. [SEAL.]
JENNIE E. TERRY. [SEAL.]
B. F. SHAUBUT. [SEAL.]
CORNELIA A. SHAUBUT. [SEAL.]

In presence of—
BERTIE HOFF RICHTER,
H. L. Y., M. G. Y.
O. C. McGILVRA,
As to all.
I. A. NADEAU,
E. L. T., B. F. S.
ANNA RASMUSEN,
J. E. T.
M. A. YOUNG,
C. A. S.

STATE OF WASHINGTON, *County of King,* } ss:

Ed. L. Terry and B. F. Shaubut, being duly sworn, each for himself deposes and says: I am one of the persons named in and who signed and sealed the foregoing supersedeas bond as a surety. I am a resident of the State of Washington and am not a counselor or attorney at law, sheriff, clerk of the superior court of said State, or other officer of said court, and I am worth the amount specified in the foregoing bond, to wit, the sum of ten thousand dollars over and above all debts and liabilities and exclusive of property exempt from execution.

ED. L. TERRY.
B. F. SHAUBUT.

Subscribed and sworn to before me this July 24, 1891.
[SEAL.] O. C. McGILVRA,
Notary Public in and for the State of Washington, Residing at Seattle.

51 On reading and filing the foregoing bond, and on motion of the above-named relator's attorneys, it is ordered that said bond, as to both the form thereof and the sureties thereon, be approved, and the same hereby is approved, as a supersedeas bond upon the writ of error herein mentioned, and that upon the filing of said bond said writ of error operate as a supersedeas in the above-entitled action.

Done at Olympia, in the State of Washington, this 24th day of July, 1891.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

[Endorsed:] No. 216. In the supreme court of the State of Washington. Henry L. Yesler, relator and appellee, *v.* The Board of Harbor Line Commissioners, W. F. Prosser *et al.*, respondents and appellants. Supersedeas bond. Copy.

[Endorsed:] Service of a copy of the within supersedeas bond is hereby admitted this 29 July, 1891. Eugene Semple, Wiley, Hale & Scott, of attorneys for the respondents. Copy of with- bond received Aug. 1, '91. W. C. Jones, att'y gen'l.

[Endorsed:] Service of a copy of the within bond admitted at Tacoma, Washington, this 10th day of August, 1891. Wm. F. Prosser, chairman Harbor Line Commission. Proof of service of within citation, bond, & writ of error returned & filed this 26th day of August, 1891. C. S. Reinhart, clerk.

52 In the Supreme Court of the United States.

HENRY L. YESLER, Plaintiff in Error,
v.
THE BOARD OF HARBOR LINE COMMISSIONERS, W. S. PROSSER, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey, Defendants in Error.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that a copy of the writ of error herein issued on July 24, 1891, was, on the 1st day of August, 1891, lodged with me for Mr. W. C. Jones, attorney for the defendants in error herein, by Mr. Thomas Burke, attorney for the plaintiff in error herein; that such copy was so lodged within sixty days after the judgment complained of in said writ of error was finally entered in my office on the opinion of the supreme court of the State of Washington, to review which said writ of error has been sued out, and that the record thereof still remains in my office.

In testimony whereof I have hereunto subscribed my name and affixed said official seal, at Olympia, in the State of Washington, this 26th day of August, 1891.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

53 In the Supreme Court of the United States.

HENRY L. YESLER, Plaintiff in Error,
v.
THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garrettson, and D. C. Guernsey, Defendants in Error.
} Assignment of Errors.

Of October term, in the year of our Lord one thousand eight hundred and ninety.

And now, to wit, on this second Monday of September, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes said plaintiff in error, by Burke, Shepard & Woods and J. C. Haines, his attorneys, and says that in the record and proceedings aforesaid and in the giving of judgment aforesaid there is manifest error in this, to wit:

(1.) That by said record and proceedings aforesaid it appears that the judgment aforesaid in form aforesaid given was given against said plaintiff in error and in favor of said defendants in error against the validity of a statute of the United States, to wit, sections 7 and 12 of an act of Congress of the first session of the Fifty-first Congress of the United States, approved September 19, 1890, being chapter 907 of the acts of the first session of the Fifty-first Congress of the United States; and in this, to wit:

(2.) That by said record and proceedings it appears that said judgment was given against said plaintiff in error and against the validity of an authority exercised under the United States, to wit, the right and authority claimed by said plaintiff in error, by virtue of the Constitution and laws of the United States and the laws of the late Territory of Washington in accordance therewith, as all thereof existed and were in force prior to and at the time
54 of the admission of the State of Washington into the Union, to have, use, and enjoy without hindrance the access and egress to and from the land of said plaintiff in error mentioned in said record and proceedings from and to the waters contiguous thereto mentioned in said record and proceedings, and to improve said access by wharfing from said land out into the said waters as the convenience of shipping might require, leaving sufficient room in the channel for the ordinary purposes of navigation, and to have, maintain, use, and enjoy his wharf and other improvements mentioned in said record and proceedings heretofore erected by virtue of the right and authority aforesaid; and in this, to wit:

(3.) That by said record and proceedings it appears that said judgment was given against said plaintiff in error and in favor of the validity of a statute of the State of Washington, to wit, an act of the legislature of the State of Washington entitled "An act to create a board of harbor line commissioners, prescribing their duties and compensation," approved March 28, 1890, and also an act of the

legislature of the State of Washington entitled "An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington," approved March 26, 1890, the validity of which statutes and each thereof was drawn in question in said record and proceedings by said plaintiff in error on the ground of said statutes and each of them being repugnant to the Constitution and laws of the United States in that the effect of the execution of said statutes and each thereof would be to deprive said relator of his property without due process of law; and in this, to wit:

(4.) That by said record and proceedings it appears that said judgment was given against said plaintiff in error and in
55 favor of the validity of an authority exercised under the State of Washington, to wit, the authority exercised by said The Board of Harbor Line Commissioners, said defendants in error, which was complained of and drawn in question by said plaintiff in error in said record and proceedings on the ground of its being repugnant to the Constitution and laws of the United States in that the constitution and laws of said State purporting to confer said authority provide no mode or means of compensation for private property taken or damaged by the exercise of such authority, and in that the exercise of such authority would amount to taking or damaging the property of said plaintiff in error without compensation and would amount to depriving the said plaintiff in error of his property without due process of law, and in that such authority concerned a matter within the exclusive jurisdiction and control of the Government of the United States, and in that the action intended to be taken by said The Board of Harbor Line Commissioners, the defendants in error, by virtue of said authority and by said plaintiff in error in said proceedings complained of and sought to be prohibited was in excess of the powers and jurisdiction of the said The Board of Harbor Line Commissioners—

Whereas by the law of the land said judgment ought to have been given for said plaintiff in error and in favor of the validity of the said statute of the United States and in favor of the validity of the said authority exercised under the United States and against the validity of said statutes and each thereof of the State of Washington and against the validity of said authority exercised under the State of Washington and in favor of the suit of said plaintiff in error for the writ of prohibition mentioned in said record and proceedings.

And the said plaintiff in error prays that the judgment aforesaid for the errors aforesaid and other errors in the record and
56 proceedings first aforesaid may be reversed, annulled, and altogether held for nothing, and that said plaintiff in error may be restored to all things which he has lost by occasion of said judgment.

BURKE, SHEPARD & WOODS AND
J. C. HAINES,
Attorneys for Plaintiff in Error, Burke Building, Seattle, Washington.

56½ [Endorsed:] No. 216. H. L. Yesler, plaintiff in error, *vs.* The Board of Harbor Line Commissioners, W. F. Prosser, *et al.* Assignment of errors. Filed Aug. 26, 1891. C. S. Reinhart, clerk.

57 In the Supreme Court of the United States.

HENRY L. YESLER, Plaintiff in Error,
v.
THE BOARD OF HARBOR LINE COMMISSIONERS, W. F. Prosser, Eugene Semple, Frank H. Richards, H. F. Garretson, and D. C. Guernsey, Defendants in Error. } Return.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that I have compared the annexed papers with their respective originals on file and remaining of record in my office, and that the same are true copies thereof and of the whole of such originals; and in obedience and in conformity with the writ of error in the above-entitled suit, I do hereby return to the Supreme Court of the United States a true copy of the record and of the proceedings in said cause and of the opinion of the supreme court of the State of Washington therein, under my hand and the seal of said supreme court of the State of Washington, and such copy is hereunto annexed; and I do likewise hereby return and transmit to the Supreme Court of the United States said original writ of error, the original citation issued thereon, the original proof of service of said writ of error and citation and of the supersedeas bond filed thereon, my original certificate of the lodging in my office of a copy of said writ of error for the attorney of the defendants in error, and the original assignment of errors filed in my office by the plaintiff in error herein.

58 In testimony whereof I have hereunto subscribed my name and affixed said official seal, at Olympia, in the State of Washington, this 26th day of August, 1891.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: Case No. 14,838. Washington supreme court. No. 1364. Henry L. Yesler, plaintiff in error, *vs.* The Board of Harbor Line Commissioners *et al.* Filed September 11, 1891.

146 U.S. 646

Office Supreme Court U.S.
FILED.
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JAMES H. McKENNEY,
CLERK

CASE NO. 14,838.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892. NO. 912.

HENRY L. YESLER, PLAINTIFF IN ERROR,

v.

THE BOARD OF HARBOR LINE COMMISSIONERS ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR THE PLAINTIFF IN ERROR.

Thomas R. Shepard,
BURKE, SHEPARD & WOODS,
ANDREW F. BURLEIGH,
Of Counsel for Plaintiff in Error.

CHARLES E. SHEPARD,
Attorney.

FILED OCTOBER 10, 1892.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892. NO. 912.

HENRY L. YESLER, PLAINTIFF IN ERROR,

v.

THE BOARD OF HARBOR LINE COMMISSIONERS ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error brought this suit in the Superior Court of King county, in the state of Washington, on October 28, 1890, for a writ of prohibition against the respondents, who constitute the Board of Harbor Line Commissioners of the state of Washington, to prohibit and restrain them from extending, locating or establishing harbor lines in front of the city of Seattle or in the harbor of that city over the wharves and docks of the relator (plaintiff in error) or any part thereof, and from filing a plat of such harbor lines in the office of the secretary of state or a duplicate thereof in the office of the clerk of the city of Seattle. Upon application made by affidavit in behalf of the relator, an alternative writ of prohibition, as prayed, issued against the Board and its members, on the date named. (Record, pages 1–3.) On November 21, 1890, the attorney-general of the state of Washington,

appearing for the Board, filed a motion to quash the writ of prohibition for the reasons, "First, that said court has no jurisdiction in the premises; second, that the petition filed herein does not state facts authorizing the issuance of said writ." (Record, page 6.) The motion was brought to a hearing on December 18, 1890, and at the opening of the argument thereon it was formally stipulated and agreed between the parties, by their respective counsel, that for all purposes the motion to quash should be taken and deemed as both a motion to quash the alternative writ and a demurrer to the affidavit upon which the application for the writ was made and granted, and that upon the decision to be made on said motion by the superior court final judgment should be entered. (See recital in the judgment, Record, page 8.) The motion being thereupon argued and submitted, as both a motion and a demurrer, the superior court, having held the matter under advisement meantime, on January 23, 1891, rendered its decision (Record, pages 7, 8) denying the motion, and ordering the entry of judgment in favor of the relator making the writ absolute; and judgment was entered accordingly on February 7. (Record, pages 8, 9.) The defendants prosecuted an appeal to the Supreme Court of the state of Washington (Record, pages 9, 10), which was heard in that court, upon the record transmitted from the superior court, on June 19, 1891. On July 8, 1891, the state supreme court rendered its decision, set forth in its opinion (Record, pages 11–13) and embodied in its judgment (Record, page 14) filed on that day, reversing the judgment of the superior court, and remanding the cause with instructions to dismiss the petition (affidavit). The relator thereupon sued out a writ of error from this court. (Record, pages 14–20.) And on February 2, 1892, upon motion of both parties, this court advanced the cause on the ground of its public urgency, setting the same for hearing on October 17, 1892.

The suit was brought to resist the attempt of the Board of Harbor Line Commissioners to exercise power to lay out harbor lines in the tidal and navigable waters of the state of Washington, sought to be conferred on them by the statute of that state; the exercise of those powers threatening injury to property rights of the relator, as he claimed. The substance of the facts made to appear by the affidavit on which the writ issued is, that the relator, a resident of the city of Seattle for upwards of thirty years, has during all that time been and still is the owner of certain upland property abutting

upon the shores of Elliott bay (the harbor of said city), and of the premises commonly known as the Yesler Wharf and Dock connected with and extending from said upland into the waters of the bay; that he erected said wharf and dock, upwards of thirty years ago, at an expense exceeding $100,000, in aid of commerce and navigation, and down to June 6, 1889, maintained the same for those purposes; that immediately after the great fire in said city of June 6, 1889, which destroyed said wharf and dock, he began rebuilding the same, and has rebuilt them at an expense exceeding $56,000, and still maintains the same as aids to commerce and navigation, in the promotion of which they have always been largely instrumental; that he has completed such rebuilding of the wharf and dock upon the faith of the protection afforded to him by an act of the legislature of the state of Washington entitled "An act for the appraising and disposing of the tide and shore lands belonging to the state of Washington," approved March 26, 1890, and is entitled, under that act, to the right of priority of purchase of the shore lands occupied by said improvements; that the respondents, the Board of Harbor Line Commissioners of the state, who were appointed under an act of the legislature of the state of Washington entitled "An act to create a board of harbor line commissioners, prescribing their duties and compensation," approved March 28, 1890, are about to take final action in the locating and establishing of the harbor lines within the limits of the city of Seattle, and, as the relator is informed and believes, they propose and are about to locate and establish such harbor lines in such a way as to include within such harbor lines a large part of his improvements above mentioned; that such extension of such harbor lines over said improvements is an attempt on the part of the Board of Harbor Line Commissioners to exercise unauthorized power and to do an act which is not within their jurisdiction, and they have no authority or jurisdiction under the laws of the state of Washington, as the relator is advised and believes, to embrace or include within the harbor lines to be located and established in front of the city of Seattle the wharves, docks or other improvements made therein; but that if the Commissioners are not prevented by a writ of prohibition of the court from extending such harbor lines over said wharf and dock, they will so extend the same and thus deprive him of the use and benefit of his said wharf and dock, without compensation or due process of law, and cloud his title to the

same in such a manner as greatly to embarrass and hinder the plaintiff in the legitimate use of his said property; that the affidavit is made for the purpose of procuring a writ of prohibition to be issued out of said superior court to said Board of Harbor Line Commissioners, and to the members of the Board (naming them), to prohibit and restrain them and each of them from extending, locating or establishing the harbor lines in front of the city of Seattle or in the harbor of the city of Seattle over the relator's wharves and docks or any part thereof, and from filing the plat of such harbor lines in the office of the secretary of state or the duplicate thereof in the office of the clerk of the city of Seattle; and that the relator has no remedy at law or in equity save the writ of prohibition applied for. The affidavit concludes with a prayer for the issuance of the writ, and for general relief. (Record, pages 3–5.)

The decision of the state supreme court, here brought under review, reversing the judgment of the trial court and remanding the cause to that court with instructions to dismiss the petition for the writ, being in effect a decision sustaining the motion to quash as a demurrer to the petition, was a decision against the sufficiency of the grounds (or any of them) laid for the writ in the affidavit or petition. The questions involved in the case, and thus arising upon the face of the affidavit, are, as the plaintiff in error conceives, those indicated in his assignment of errors; all those questions were distinctly controverted in the trial court and in the supreme court of the state; and they may be concisely stated as follows:

(1.) *Have the Board of Harbor Line Commissioners of the state of Washington, since the enactment of sections 7 and 12 of the "Rivers and Harbors Act" of Congress approved Sept. 19, 1890 (26 U. S. Stats. pp. 454, 455), any jurisdiction to lay out harbor lines in the waters of Puget Sound, the bays or arms thereof, or to interfere in any way with the use of those waters or the access thereto?* And, as a subordinate question involved in the foregoing—

(2.) *Can the plaintiff in error raise the claim of exclusive jurisdiction in the United States over navigable waters?*

These questions are indicated by the first assignment of error (Record, page 27).

(3.) *Has the plaintiff in error, holding land abutting on the waters of Puget Sound under a patent issued to him by the United States prior to the existence of the state of Washington, the right and authority, by virtue of the constitution and laws of the United States and the laws of the late territory of Washington in accordance therewith, as all thereof existed and were in force prior to and at the time of the admission of the state of Washington into the Union, to have, use and enjoy without hindrance the access and egress between his said land and said contiguous waters?* And, if this question be resolved affirmatively—

(4.) *Has the plaintiff such right and authority, upon the same basis, to improve his said access by wharfing out from his land into the waters as the convenience of shipping may require, leaving sufficient room in the channel for the ordinary purposes of navigation, and to have, maintain and enjoy such wharf and like improvements?*

These questions are indicated by the second assignment of error (Record, page 27).

(5.) *Is the statute of the state of Washington, under which the Board of Harbor Line Commissioners were appointed and were about to act when prohibited, repugnant to the constitution and laws of the United States, in that the effect of the execution of the statute in respect to the waters contiguous to the plaintiff's land would be to deprive him of property without due process of law?*

This question is indicated by the third assignment of error (Record, pages 27–8).

(6.) *Is the authority sought to be exercised by the Board of Harbor Line Commissioners under the constitution and laws of the state of Washington repugnant to the constitution and laws of the United States, in that the authority conferred provides no mode or means of compensation for private property taken or damaged by its exercise and that the exercise of the authority in this instance would amount to taking or damaging the plaintiff's property without compensation and to depriving him of it without due process of law, and in that such authority concerns a matter within the exclusive jurisdiction and control of the government of the United States?*

This question is indicated by the fourth assignment of error (Record, page 28), and is a re-statement, within the scope of an-

other ground of the jurisdiction of this court to review the case, of all the other questions above stated.

The decision of each of these questions involves the consideration of another, ancillary to all of them :

(7.) *Is the plaintiff entitled to invoke the writ of prohibition to prevent the alleged unlawful contemplated action of the Board of Harbor Line Commissioners?* That is, is he so interested in the effect of such action as to be entitled to seek its prevention, and if so, will a writ of prohibition lie to prevent it?

SPECIFICATION OF ERRORS RELIED UPON.

The plaintiff relies upon all the errors stated, abstractly, in the formal assignment of errors in the Record (pages 27–8). They may be here more succinctly presented as follows :

I.

The state supreme court erred in deciding that the intended exercise of authority by the Board of Harbor Line Commissioners, and the state legislation conferring that authority, are not an invasion of the jurisdiction over navigable waters, and over the subject of navigation and harbor lines, assumed by the United States in the act of Congress of 1890.

II.

The state supreme court erred in deciding that, in any event, the United States, by its proper officers, is the only party that could interfere to prevent the exercise of jurisdiction under state authority over navigable waters.

III.

The state supreme court erred in deciding that the plaintiff in error has no right of property in the access, to and fro, between his land and the contiguous tidal waters (and hence, by necessary consequence, no right to maintain his wharf erected therein, to facilitate his access to the adjacent navigable waters).

IV.

The state supreme court erred in deciding that the effect of the execution by the Board of the statute under which they were ap-

pointed would not be to deprive the plaintiff of property without compensation and without due process of law.

V.

The state supreme court erred in deciding that the plaintiff in error is not entitled to invoke the writ of prohibition to prevent the intended action of the Board.

ARGUMENT.

The existence of the first and second of these specified errors will be established by a negative answer to the first and an affirmative answer to the second (or the sixth) of the questions formulated above. The existence of the third error specified will be established by an affirmative answer to the third and fourth questions, or to the third alone (or to the sixth). The existence of the fourth error specified depends upon an affirmative answer to the fifth question (or to the sixth); and the fifth error likewise follows upon an affirmative answer to the seventh question. If the court shall find in the decision below either the first, second and fifth, or the third, fourth and fifth of the errors above specified, a reversal of the judgment must follow. The existence of these several errors will be maintained in a series of four propositions (the first two errors being treated together under the first proposition):

First.

The Congress of the United States has, by the act of 1890, in the exercise of its constitutional power to regulate commerce, assumed jurisdiction over the harbor of Seattle, in common with all other navigable waters of the United States; the intended action of the state Board of Harbor Line Commissioners is an invasion of that federal jurisdiction, and in excess of any power that a state board can now constitutionally exert; and any person affected by such state invasion of the field of federal control can challenge the state's power in an appropriate proceeding.

1. In sections 7 and 12 of the act of September 19, 1890, "Making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," Congress has, for the first time, exercised its constitutional power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," to its full extent as respects the waters whose navigation Congress can thus reg-

late. Previous legislation had from time to time applied that power to the regulation or protection of navigation, in sundry particulars, upon specific waters; but no general exercise of the constitutional power to regulate international and interstate navigation upon all waters capable of bearing it had been undertaken; the power in part lay dormant. Sections 7 and 12 are as follows:

"Sec. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, that this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw-bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

"Sec. 12. That section twelve of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and re-enacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor-lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the Court for each offense."

The scope of the federal power to regulate commerce, and the effect of that power, and of its exercise, upon the action of a state on the subject matter, have been defined by this court in a series of decisions:

The power to regulate commerce includes the power to regulate navigation, but not that commerce or navigation which is completely internal.

Gibbons v. Ogden, 9 Wheat. 1.

It does not in any case prevent exercise of the police power of a state, the operation of its inspection laws or sanitary laws, or its furtherance of internal improvements, so long as these do not conflict with the federal regulation of navigation and commerce; but if they do, the state law must yield, under whatever state power it be classed.

Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245.

Gibbons v. Ogden, supra.

Thus, a state law cannot justify the maintenance of a bridge which obstructs river navigation that Congress has regulated, even though only by establishing ports of entry on the river and licensing and regulating vessels navigating thereon. But this court, in such a case, "will enter upon the inquiry whether the laws" of the state, coming in collision with an act of Congress, have "deprived a citizen of a right to which that act entitles him;" and if not, if his injury is only consequential, and unconnected with any right grounded on federal regulation, he can have no relief against those acting under the state law.

State of Pennsylvania v. Wheeling &c. Bridge Co., 13 How. 518.

Gibbons v. Ogden, supra.

Gilman v. Philadelphia, 3 Wall. 713.

So, a state statute regulating the transfer or incumbering of personal property is inoperative as to vessels of the United States (the vehicles of interstate or foreign commerce) the mode of whose transfer or incumbrance Congress has prescribed. And a state law requiring all vessels, before leaving a port of the state, to file a statement in a state office, or one requiring those entering a port to pay a fee, apart from service rendered, to the portmaster and

wardens, is equally void ; or a law imposing a tax upon foreign commerce under the guise of furtherance of the state inspection or police laws ; or one imposing a state tax upon the gross revenues of a corporation of that state, engaged in interstate or foreign commerce ; or even a law enforcing upon passengers coming within a state perfect equality of treatment with those who board the vessel within the state, to travel only within it.

White's Bank v. Smith, 7 *Wall.* 646.

Aldrich v. Aetna Co., 8 *Id.* 491.

Sinnot v. Commissioners of Pilotage of Mobile, 22 *How.* 227.

Steamship Co. v. Portwardens, 6 *Wall.* 31.

Henderson v. Mayor of New York, 92 *U. S.* 259.

People v. Compagnie Generale Transatlantique, 107 *Id.* 59.

Philadelphia &c. Steamship Co. v. Pennsylvania, 122 *Id.* 326.

Hall v. DeCuir, 95 *Id.* 485.

The federal power may extend over all waters, and the instruments of navigation thereon (including the wharves which furnish the means of embarking and debarking), which, though wholly internal to a state, form by themselves, or uniting with others, a continuous highway over which commerce is or may be carried on with other states. It even applies to navigation of the high seas between ports of the same state. And it entitles the federal government to control the improvement, according to its own discretion, of the waters over which the power is extended, though injury result to the interest of a state or one of its municipalities.

The Daniel Ball, 10 *Wall.* 557.

Foster v. Commissioners of Pilotage of Mobile, 22 *How.* 244.

Miller v. Mayor of New York, 109 *U. S.* 385.

Gloucester Ferry Co. v. Pennsylvania, 114 *Id.* 196, 206.

Lord v. Steamship Co., 102 *U. S.* 541.

South Carolina v. Georgia, 93 *Id.* 4.

Wisconsin v. Duluth, 96 *Id.* 379.

The possession of this power by Congress does not inhibit state action in respect to waters as to which the power still lies dormant. In such cases the state, unless Congress acts, may continue to legislate.

Wilson v. Blackbird Creek Marsh Co., supra.

Escanaba Co. v. Chicago, 107 U. S. 678.

Transportation Co. v. Parkersburg, Id. 691, 701.

Gloucester Ferry Co. v. Pennsylvania, 114 Id. 196.

Willamette Iron Bridge Co. v. Hatch, 125 Id. 1.

But "it is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided." And where the power to regulate has been applied, as regulation "implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing; that regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered; it produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated." In other words, the non-exercise by Congress of its power is "equivalent to a declaration that interstate commerce shall remain free and untrammelled."

Gilman v. Philadelphia, supra.

Gibbons v. Ogden, supra.

Welton v. Missouri, 91 U. S. 275.

Hall v. DeCuir, supra (p. 490).

See *Miller on the Constitution, pp. 457–8.*

Congress has now acted upon its whole field of jurisdiction, to the extent of regulating all harbor lines and all erection of wharves therein. In section 7 (quoted above) of the act of 1890 it has forbidden the erection of "any wharf . . . . or structure of any kind outside established harbor-lines" (clearly, not harbor lines established by state authority, but those to be established by the Secretary of War pursuant to section 12 of the act), "or *in any navigable waters of the United States where no harbor lines are . . . . established*, without the permission of the Secretary of War, in any port . . . . or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters," and has likewise forbidden the commencement of "construction of any bridge, ... causeway or other works . . . . in any port . . . . or navigable waters of the United States, un-

der any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War," and has forbidden the filling or the alteration in any manner of the "course, location, condition or capacity of the channel," of any such navigable waters, unless approved and authorized by the Secretary of War. And in section 12 it has authorized the Secretary of War to cause such harbor lines to be established, "beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him."

It is clear that Congress has thus undertaken, once for all, to regulate and control the development of wharves and like facilities of commerce upon the frontage of *all* "navigable waters of the United States;" of which the waters and harbors of Puget Sound form no insignificant part.

See *Transportation Co. v. Parkersburg*, *supra* (*p. 701*).

2. On the other hand, what is it that the defendants, under state authority, seek to do?

The defendants are a board appointed pursuant to an act of the state legislature, enacted in the year 1890 in execution of the provisions of article XV of the state constitution. The full text of that article of the constitution will be found on pages I and II of the appendix to this brief; and the full text of that statute no page IV of the appendix. The substance of the constitutional provision is, that the legislature shall provide for the appointment of a commission to establish harbor lines in all the navigable waters of the state lying within or in front of the corporate limits of any city or within one mile thereof on either side; that the state shall never give, sell or lease to any private person or corporation any rights in the waters beyond such harbor lines, and shall reserve from sale a strip from fifty to six hundred feet in width (as the commission shall determine), for landings, wharves, streets and other conveniences of navigation and commerce, and shall never relinquish its right to control such strip, but may under general laws lease the right to build and maintain thereon wharves, docks and other structures, for a term not to exceed thirty years, or may under general laws itself so utilize such "harbor area." And the substance of the statute is, that a board of harbor line commissioners

is thereby created, to consist of five persons to be appointed by the governor, that their duties shall be to locate and establish harbor lines as prescribed by the constitutional provision and perform all other duties thereby prescribed or which the law may prescribe, and that whenever they shall have established such harbor lines in any of the waters of the state they shall file duplicate plats thereof in the offices of the secretary of state and of the clerk of the city, "and from and after the filing of said plat, the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this state."

Acting under these provisions of state law, the defendants had made surveys of the harbor of Seattle, determined upon the place of a harbor line, fixed upon six hundred feet, extending shoreward from that line, as the width of the strip that they would set apart as their "harbor area," and prepared a map embodying this, their decision; and they were about to certify and file the duplicates of this map in the public offices specified by the statute, when the writ of prohibition intervened to prevent. This strip of water selected by the Board as the harbor strip or area to be "improved" by the state or leased to others to improve, under the constitutional provision, embraces within it all the best anchorage in the harbor of the city of Seattle, the outer rim or "harbor line" proper running into fifty feet of water; and it covers the immediate frontage of all the wharves and docks that sustain the city's busy commerce, domestic, coastwise and foreign, as well as the greater part of the structure of several of the most important among these, chief of which is the "Yesler Wharf and Dock," here involved, at which vessels of heavy tonnage from all parts of the world make port.

Some of these facts appear only by allusion in the record, but they have throughout the controversy been conceded to exist and were discussed at the bar of the courts below, and they are facts of the physical situation, of which this court can take judicial notice. What does appear explicitly is the fact that the Board, when prohibited, was about to locate and establish the "harbor lines" (that is, the outer or proper harbor line, and the parallel line farther inshore, delimiting the harbor strip) in such a way as to include between them a large part of the plaintiff's wharf and dock, erected at great expense across his upland frontage and "used in build-

ing up and promoting the commerce of the city of Seattle and the state of Washington," and "necessary aids to commerce and navigation." (Record, pages 3, 4.) And, by the statute, upon the locating and establishing of such harbor lines by the filing of the map thereof as prescribed, "the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this state." (See appendix to this brief, page IV.)

Here, then, is a plain conflict of jurisdiction over the regulation of the harbor of Seattle, its navigation, anchorage and wharves; and a conflict directly and vitally affecting the use of the plaintiff's wharf and dock as instrumentalities of that navigation. Under the "regulations" of the federal statute no wharf or other structure can be placed *anywhere* in front of the plaintiff's wharf and dock, obstructing free access between it and the deep navigable waters of the Sound, until the Secretary of War shall have established a harbor line, and after that none outside such harbor line without the Secretary's permission. Under the state statute, a harbor line, which may lie much farther out than that which the Secretary of War would fix upon, may be laid down, and within its limits wharves and other structures may be erected by the state or its lessee of the harbor strip, in front of the plaintiff's wharf, obstructing navigation to and from it. The conflict of the state law with the federal is plain. The interest of the plaintiff in that conflict is plain. The state law must yield to the federal.

3. But can it be made to yield at the plaintiff's instance, on account of his interest in the conflict?

The learned judge of the state supreme court has laid it down, in his opinion in this case, that "The United States, by its proper officers, is the only party that could interfere in such a case." But our research has discovered no other authority to that effect.

The cases in which only the public authorities can intervene to prevent an excess of power are those where the power has been restricted from motives of public policy, while those who have dealt with the body transcending its power cannot justly be heard to challenge the unauthorized act. Such are the cases of loans by a national bank to an individual in excess of the limit prescribed by the act creating them; and, still more familiarly, the cases of corporate violation of the conditions of a franchise. The borrower

from the bank cannot be heard to allege that the bank had no power to make him so large a loan ; he is estopped by every principle of good faith, and the government, which imposed the limit of action as a condition of the grant of power to act, is alone privileged to call its creature to account. So, the franchise of a corporation cannot be collaterally attacked for breach of its conditions, but can only be annulled directly at the suit of the sovereignty that conferred the franchise, because the condition was imposed by the creating power as a means of its own control of the privileges conferred, and not as a source of rights, in others, adverse to its grantee.

But here the state undertakes to exercise a power that it does not possess, even upon conditions ; to regulate matters that another independent sovereignty possesses the sole power of regulating. Resistance to the state's acts looking to such regulation is a direct challenge of its power, and not in any sense a collateral or incidental attack. The fact that no case is to be found expressly adjudging that the citizen may thus challenge the action of a state, in a matter within the sole province of the United States, proves nothing ; it would be strange, indeed, if there were such a reported decision. For every one of the cases above cited, and many others, upholding the power of the United States and annulling the action of a state in the regulation of commerce, has grown out of a suit between a citizen and a state or those acting under its authority, the citizen challenging the state authority on the ground that the subject matter was under federal control. The United States in no instance has itself attacked or resisted the assumption of state power. It has left the citizen affected to appeal to it as the sovereignty whose power in the premises is exclusive.

The sole question remaining, then, as to the plaintiff's right to arrest the intended action of the state officials on the ground that they are trespassing upon the domain of the federal power, is, whether the plaintiff, who has already been shown to be vitally interested in the result of the state's line of action, has chosen the proper remedy, and at the proper time, to protect himself. That question belongs to a later branch of the argument. Assuming here an affirmative answer to that question, we submit that, even if the state of Washington at the time its constitution was adopted had the right, on account of the non-action of Congress, to provide for laying out harbor lines and improving or leasing "harbor

areas" in the waters of Puget Sound, its power to carry out those provisions ceased with the assumption by Congress of full federal control of all harbors, in the act of 1890; and that the plaintiff, as the owner of a wharf the use of which for the purposes of navigation would be obstructed by the consummation of the state's plan, is entitled at the proper time and in the proper manner to challenge and arrest the action of the state.

SECOND.

The plaintiff has a right of property in the access, to and fro, between his land and the contiguous tidal waters; and a right to maintain his wharf erected therein, to facilitate such access to and from the adjacent navigable waters.

The state supreme court held, in deciding this case, that "As against the state a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide. . . . . The doctrine of the case of *Eisenbach v. Hatfield*, above cited (2 Washington, 236), must obtain, and under it the rights of the parties hereto must be determined. It will thus be seen that the petitioner has no rights to the land in controversy, and at the most the only vested right he has is in the wharf constructed thereon." This bare enunciation of its doctrine, without discussion of its grounds, is about all that the court below said in its opinion on this point; but by its reference to its then recent decision in the case of *Eisenbach v. Hatfield* the court imported into the decision of this case all its views and reasons set forth in the other.

In the Eisenbach case, the state supreme court reversed a decision of the trial court sustaining a demurrer to the defendant's answer to the plaintiff's amended complaint. The amended complaint averred, in substance, that the plaintiff was the owner of certain upland bordering and abutting upon the high water mark of Puget Sound, that by reason of such ownership he was entitled to certain littoral rights in and to the shore opposite his lands, and that the appellants were occupying the shore opposite his land, and erecting structures and improvements thereon; and prayed an injunction. The defendants in their answer, disclaiming any right or title to any land above high water mark, averred that the land occupied by them was part of the shore of Puget Sound, and that valuable improvements, in actual use for commerce, trade and business, had been made upon said lands long prior to the passage

of the tide land act of March 26, 1890 (see appendix to this brief, pp. V–VII), and were on and prior to that date in actual use for those purposes, and that the defendants were the owners thereof, and purposed to erect on said shore conveniences for shipping, and the plaintiff would have the right, in common with all other persons, and upon the same terms, to use such conveniencies when erected ; and denied that the plaintiff had been denied access from the lands to the navigable waters of the Sound for any purposes of commerce or navigation, or had desired access to or egress from said waters for any such purpose ; alleged that the harbor lines had not yet been fixed opposite said lands and the lands had not been disposed of by the state of Washington ; and denied that the defendants had wrongfully or unlawfully obstructed plaintiff's access to the navigable waters of the Sound.

The state supreme court in that case, in its majority opinion, after discussing at length a number of reported cases, said : "The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good. If the state cannot exercise its constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development which every government is supposed to possess—a proposition to which we cannot assent. . . . . We cannot think that the building by the state or its grantees of wharves upon shores of navigable waters would constitute either a taking or damaging of private property for public use, in contemplation of the constitution."

To reach this conclusion in the Eisenbach case, the learned chief justice, in his opinion, began by saying :

"In this case this court is called upon for the first time to determine the rights of littoral proprietors of lands abutting upon the shore of an arm of the sea in which the tide ebbs and flows ; and, *while it is scarcely necessary to look beyond our own constitution and laws for authority to guide us to a conclusion*, still owing to the importance of the questions both to individuals and the public, and the magnitude of the interests involved, we have examined

the numerous authorities cited by the learned counsel . . . . in order that we might familiarize ourselves with the decisions of other courts upon the subject, and with the reasons upon which their decisions are based."

1. With all respect to the learned supreme court of the state of Washington, we submit that neither that court nor this can determine the plaintiff's rights as a littoral proprietor without looking beyond the constitution and laws of that state "for authority to guide us to a conclusion." The question is one of invasion of a right of property which vested in the plaintiff, if he has the right at all, long prior to the existence of the state of Washington or the framing of its constitution. The plaintiff has owned the upland from which his wharf extends, as he avers in his petition, for upwards of thirty years past; his right of access therefrom to the waters of the Sound is claimed simply as an incident of that upland proprietorship; and if it is such incident at all, it has been such, and as such has been a part of his property rights in the upland estate, for a generation past. The plaintiff is asserting that property right and claiming its protection under the provisions of the federal constitution. Whether he *has*, as he asserts, a right of property in the access and egress, is the question now presented; but that question is to be determined by the law as it existed anterior to the birth of the state of Washington—as it existed when the title to the upland, as an incident of which he claims this right of access, was derived from the original source of title.

See *Knight v. U. S. Land Association*, *142 U. S. 161.*

The original source of title to all lands of private ownership in the territory of Washington is the United States. The United States acquired the sovereignty and proprietorship of the region embraced within that territory by the right of discovery and settlement; and confirmed and strengthened that right by obtaining treaty recognition of it from the government of Great Britain, which had to a certain extent made a like claim of like origin. The territory being thus acquired, there flowed into it, with the advent of the first American settlers, the common law as the broad rule and basis of municipal rights: the common law of the older states, from which flowed the stream of settlement to this new region, so far as that law was applicable to the circumstances and condition of the inhabitants of the new country over which it was

thus extended. And that common law of the older states, in turn, was the old common law of England, coming thence with the advent of the first settlers under the British colonial governments, so far as applicable to the circumstances and condition in which they found themselves, on taking up their habitation in those colonies. And in recognition of this principle the common law of England, so far as not repugnant to or inconsistent with the constitution and laws of the United States and the organic act and laws of the territory, was long since declared, by express enactment of the legislative assembly of the territory of Washington, to be the rule of decision in all the courts of the territory.

"Civil Practice Act" of January 28, 1863, Session Laws of Washington Territory 1862–3, p. 83, § 1.

Thus, to ascertain what rights, if any, passed with the grant by the United States of a private estate in the territory, abutting on navigable waters, as incidents of that private estate, we must ascertain what was the common law of England in respect of such estates, how far, if at all, that common law had been modified by necessary adaptation to the circumstances and condition of the inhabitants of the older states of this country, and how far it was again modified, if at all, by adaptation to the circumstances and condition of the people of Washington Territory.

But, it is said, the United States Supreme Court leaves all questions of property rights incident to estates bordering on waters, navigable or unnavigable, to the decision of the courts of the states within which those lands and waters lie. This is true only within certain limitations. Chief among those limitations is this, that the states will not be allowed, by legislation or by judicial decision, to impair previously vested rights, incidental or otherwise, in such estates.

Ohio Life & Trust Co. v. Debolt, 16 How. 432.

Jefferson Branch Bank v. Skelly, 1 Black, 436.

Bridge Proprietors v. Hoboken, 1 Wall. 116.

Gelpcke v. Dubuque, Ib. 175.

Yick Wo v. Hopkins, 118 U. S. 356.

Gormley v. Clark, 134 Id. 338.

And the courts of the United States will construe the grants of

the general government without reference to the rules of construction adopted by the states for their grants ; and although the rights and incidents attached to the ownership of property conveyed by the government will be determined by the states, this is subject to the condition that the rules laid down by the states do not impair the efficacy of the grant or the use or enjoyment of the property by the grantee.

Packer v. Bird, 137 U. S. 661, 669.

(It is to be noticed, too, that in the case last cited the United States patent for the land involved issued long after the admission of the state ; and the same is true of the patent in *Hardin v. Jordan, 140 U. S. 371.*)

It cannot be otherwise. The supreme court of a state, in deciding whether any right of access to navigable waters is incidental to the ownership of an estate bounding thereon, in effect decides whether any such right *was* incidental when the private estate in the land first vested. That incidental right, if it existed when the private estate first vested by patent from the United States, was a right grounded on a federal grant and existing by virtue of the law of the United States in force in the territory. Any question concerning its then existence depends on the then existing rule of law. If the right then existed, it still exists (unless meanwhile divested by the owner's act or by the exercise of the eminent domain) when the courts of a state, afterward created to embrace the territory, undertake to decide the question. And to say that the existence, at the time of the issue of the patent, of the incidental right claimed depends on the decision of the courts of a state long afterwards created, is to hold the effect of the grant in abeyance for an indefinite time and leave every title and the extent of every right respecting real property in a territory unsettled until, in the fullness of time, a state shall be formed and its courts shall reach the question. Such a doctrine would arrest the acquirement of estates in the territories, and paralyze their development.

2. The question, then, is not, What are, according to the constitution, statutes or judicial decisions of the state of Washington, the rights incident to the plaintiff's estate by reason of its abutting on navigable waters? but it is, What *were* those rights when the land was patented by the United States?

The plaintiff is an original patentee of the United States, under

the "Donation Act" of September 27, 1850 (9 U. S. Stats. pp. 496–500) of a tract of about 160 acres of land, entered by him in 1852, embracing all the upland mentioned in the petition and bounded on the west by the meander line of Elliott bay. That he is such an original patentee is not expressly stated in the petition, but has throughout been conceded, and assumed in argument, by the defendants; but, in any case the absence of an averment to that effect is immaterial. For if not an original patentee, the plaintiff must derive his title to the upland *under* a patentee of the United States; because, as we have said, the United States is the source of all title to private estates within the territory. His upland estate, as the petition avers, "abuts upon the shore of Elliott bay." Elliott bay is a part of Puget Sound, an arm of the sea. We have reached, then, the question, Was there, when the United States granted this land, abutting upon the waters of the sea, a property right, incident to the ownership of the fee of the land, in the access which by nature existed between the land and the adjoining water?

First, on principle, irrespective of time, locality or written law.

Under a constitutional government, all men possess the right to to come and go at will. This is of the essence of personal liberty. Again, in a civilized state land is the subject of individual ownership, which imports the right of exclusion of all others from entry upon it. But if all land and all waters as well, throughout a state, were the subject of individual ownership, the right of property would extinguish the right to come and go; for it would make the right of the individual to move from place to place dependent on the consent of other individuals owning the land or waters over or beyond which he might desire to pass. Hence the existence of highways alone renders possible the co-existence of these two fundamental rights, of private property and personal liberty to come and go. They are places reserved from individual ownership, to be free for the passage of all individuals over them, to and fro, as their desires may dictate. The right of the public in highways is simply the sum of individual rights to come and go at will and provides for its exercise consistently with the institution of private property.

Now, men do not *live* within the highway; they are upon it transiently, not permanently. In a state of society in which the highway

exists, private estates in land exist also, and upon these men have their abiding places. *Somewhere* they must come upon the highway from a private estate, in order to exercise the right to make use of it; and somewhere they must leave it and enter a private estate; for private ownership of land completely surrounds and incloses the whole system of highways, both upon land and water.

But since private property in land embraces the right of exclusion, the individual cannot lawfully enter the highway at all, or leave it at all, by way of the estate of another, save with that other's consent.

To use the highway at all, then, save at another's will, the individual must have the *right* of access and egress from and to his own adjoining estate; in other words, the *right* of access to a highway must go with the ownership of adjoining land. Hence the right of access to a highway from adjoining property, as an *incident* of the ownership of that property, is essential to the coexistence of the institution of private property and the right to come and go. The preservation of that right is the indispensable condition of the continued vigor of both of these fundamental rights. When the state denies access to its highways as an incident of the the ownership of adjoining land, there is a potential retrogression either toward the nomadic state, in which there is no private estate in land, or toward a state of villenage, in which there is no liberty to move beyond the defined limits of a private estate. For if the state can cut off access to its highways from one adjoining estate, and deny a right of property in that access, potentially it can do so as to all.

Thus the right of access inheres in the very constitution of free government.

But although the right of access is an incident of private property and is itself private property, it is not antagonistic to the public right in the highway, being, as has been said, but the correlative of that private right to come and go, of which the public right in the highways is a mere aggregation. The state appropriates the use of certain areas as highways, for the exercise thereon by the whole public of the individual right of travel; not as a private estate of the sovereign.

The state may or may not, for the fuller protection of the use thus appropriated for the public, acquire, or possess originally, the

title to the fee of the area set apart as a highway. But the right of the public—the aggregation of the individual right of travel—being merely in the use for the purposes of a highway, its correlative, the private right of access, does not depend at all on private ownership of the fee of the highway, nor is it affected by state ownership thereof. The individuals who compose the public are only remotely concerned in the state's owning the fee of such highways; their direct interest is in the use, and that interest, it must be repeated, constitutes in the aggregate the public right of use.

That use the state holds to guard for the public. The state, as a trustee with full discretion, is the sole judge of whether the public continues to require the use in a particular instance, as to a definite part of the system of highways. It can divert such area, if it sees fit, from subjection to the public use, and, if it owns the fee, can dispose of the area, thus released from the use, for other purposes—can sell it, and apply the proceeds to other public uses; or can permit another use to be imposed upon it, inconsistent with and which diminishes or wholly destroys the ordinary public use for travel. The public at large cannot complain of this, for the state is their trustee with uncontrolled discretion. But if it takes this course, the state in so doing extinguishes a portion of those private rights of access whose sum is the correlative of the public aggregate of the individual rights of use. In doing this, it exercises the power of eminent domain. For what is taken by this exercise it is bound, under our written constitutions, to make compensation.

Turning now to the adjudged cases, we find that these principles, though sometimes only vaguely apprehended, have been applied and developed by judicial decision till they are now fully recognized, as respects highways on land. The state, as trustee of the use of a highway, for the protection of the public enjoyment of that use, may diminish the use by permitting the area, or any part of it, to be used for a railroad, or for any other use wholly or partly inconsistent with its proper use as a highway, that is, it may dispose of the right of public use *pro tanto;* or it may vacate the tract as a highway, thus extinguishing altogether the public use, and allow the use of the tract to revert to the owner of the fee therein, or, if the state itself owns the fee it may sell it for profit. But it must compensate for the resulting destruction or impairment of the access from adjoining private property to

that highway and thence to the whole system of highways, as for a right of property taken or damaged in the exercise of the eminent domain. Again, to effectuate the public use of the highway, the state may improve it for that use by grading it, cutting it down below the level of the adjoining property or embanking it above; or raising the highway high above the adjoining property by a viaduct. But it must compensate for the impairment or destruction of the right of access which results even from such a work of improvement for the public good, at least under the broader compensation clause embodied in several of the later state constitutions, among which stands that of the state of Washington. (See appendix to this brief, page 1.) The doctrine of ways of necessity is another recognition by the law of the essentiality, to the co-existence of private property and personal liberty, of the right of access to ways of public travel.

Railroad Co. v. Schurmeir, 7 Wall. 272.

Adams v. Chicago &c. R. Co., 39 N. W. Rep. 629 (Minn.).

Railway Co. v. Lawrence, 38 Ohio St. 41.

Theobold v. Louisville &c. Ry. Co., 66 Miss. 279.

Protzman v. Indianapolis &c. R. Co., 9 Ind. 407.

Cooley's Const. Lim. (6th Ed.), p. 682, n. 2.

Story v. N. Y. El. R. Co., 90 N. Y. 122, 145–6.

Elliott on Roads & Streets, pp. 526, 532, 662.

Rigney v. Chicago, 102 Ills. 64, 74–5.

Chicago v. Taylor, 125 U. S. 161.

Borough of New Brighton v. U. P. Church, 96 Pa. St. 331, 339.

Reardon v. City of San Francisco, 66 Cal. 492, 501–5.

Sheehy v. Kansas City C. Ry. Co., 94 Mo. 574.

City Council of Montgomery v. Maddox, 89 Ala. 181.

But most important among all the highways recognized by municipal law, and by the law of the United States, are navigable waters. The sea has been well termed the "highway of nations." It is, in the last analysis, simply because navigable water *is* a highway that the right of access to it exists; and it must continue to exist in the recognition of constitutional government, just so long

as the right continues to exist in respect to estates abutting on highways upon land. Not only are navigable waters, and especially those within the ebb and flow of the tide, a highway by nature and by the law of nations, but all the waters of the territory northwest of the river Ohio, and, like them, all the waters of Oregon and Washington, have been expressly declared to be public highways, forever free, by enactment of positive law.

Northwest Territorial Ordinance of 1787, Art. IV., ad fin. (*U. S. Rev. Stats. p. 16*).

Act of Aug. 14, 1848, § *14* (*9 U. S. Stats. 329*).

See *U. S. Rev. Stats.*, § *2476*.

"Unless," says the court of appeals of New York, commenting upon the rule established as to land highways by the elevated railroad cases, "unless there is some distinction to be made between the rights which pertain to an owner of land upon a public river, and one upon a public street, *which is not perceived*, then the principles sanctioned by this court in these cases virtually overrule the Gould case, as they are apparently irreconcilable."

Rumsey v. New York &c. R. Co., 30 N. E. 654.

The adjacency in the one case, as in the other, is an advantage existing by nature; and, as Lord Selborne says, "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae*, because his land has, by nature, the advantage of being washed by the stream."

Lyon v. Fishmonger's Co., 1 App. Cas. 662.

This is the whole and sole foundation of the riparian or littoral right of access: the same foundation as that for the right of access to a land highway from a contiguous lot or tract of land. In the one case, as in the other, the right of access rests upon the adjacency which affords access, not upon the ownership of the fee of the highway or its bed. As has been said by this court: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable river from the front of his land, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose

for the protection of the rights of the public, whatever those may be."

Yates v. Milwaukee, 10 Wall. 497, 504.

Failure to keep it in view that the ownership of the highway is in no sense the foundation of the right of access has constantly led to confusion and misconception of the nature of the right claimed; and to the attempt to draw an unfounded distinction between fresh waters and tidal waters as to the existence of this right. In the one case the bed of the waters is owned, under the law of some states, by the proprietor of the adjacent land, under the law of others, by the state; while in the case of tidal waters the title to the fee of the bed is everywhere held to be in the state. But in each case the adjacency of the upland gives to its private owner a natural opportunity of direct access to that highway, and the use of that opportunity cannot be denied him without establishing a principle that, logically extended, would admit of the denial of like access from every private estate to every highway, and hence a denial of access by all individuals to all highways. The riparian right of access to fresh waters is no more clear or absolute than to the sea, whoever may own the bed of the stream.

Delaplaine v. Chicago &c. Ry. Co., 42 Wis. 214, 226–7.

So great is the consensus of authority among the courts, English and American, and among text writers and commentators, in support of the doctrines that we have sought here to enunciate, that it is enough to cite to this court, without comment, the leading decisions and statements of principle; and to discuss very briefly a few cases that are claimed to sustain a contrary view.

Dutton v. Strong, 1 Black, 22.

Railroad Co. v. Schurmeir, 7 Wall. 272.

Yates v. Milwaukee, 10 Id. 497.

Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418.

Lyon v. Fishmonger's Co., 1 App. Cas. 662.

Byron v. Stimpson, 1 Pugs. & B. (N. B.) 697.

Bowman's Devisees v. Wathen, 2 McLean, 376.

Clark v. Peckham, 10 R. I. 35.

Providence S. E. Co. v. Providence &c. Steamship Co., 12 Id. 348.

Simons v. French, 25 Conn. 346.

Tinicum Fishing Co. v. Carter, 61 Pa. St. 21.

Bond v. Wool, 12 S. E. Rep. 281 (N. C.).

Hickok v. Hine, 23 Ohio St. 523.

Bambridge v. Sherlock, 29 Ind. 364.

Myers v. St. Louis, 82 Mo. 367.

Chapman v. Oshkosh &c. R. Co., 33 Wis. 629.

Delaplaine v. Chicago &c. Ry. Co., 42 Id. 214.

Boorman v. Sunnuchs, Ib. 233.

Diedrich v. Northwestern Union Ry. Co. Ib. 248.

Brisbine v. St. Paul &c. R. Co., 23 Minn. 114.

Miller v. Mendenhall, 43 Id. 95.

Shirley v. Bishop, 67 Cal. 543.

Gould on Waters (2nd Ed.), §§ 124, 148–154.

Dillon on Mun. Corp. (4th Ed.), § 106 and note.

Cooley's Const. Lim. (6th Ed.), pp. 670–71.

3 Washburn on Real Property (5th Ed.), p. 445.

Lewis on Eminent Domain, §§ 77–83.

Ray on Negligence &c., pp. 358–9.

Only three or four prominent decisions in the state courts are opposed to this doctrine; and, in view of the sequel of those decisions, they require but brief consideration.

In the case of *Gould v. Hudson River R. Co., 6 N. Y. 522*, it was held by the court of appeals of New York, in 1852, that the owner of lands adjoining a navigable and tidal river, having no private property in the waters or the shore, is not entitled to compensation from a corporation which, under legislative authority, occupies the shore so as to cut off his access to the river. In 1870 it was held in New Jersey, in *Stevens v. Patterson & Newark R. Co., 34 N. J. L. 532*, that the owner of land bounding on navigable water was invested with no rights in the water, or of access thereto, as appurtenant to his estate. This last decision

rested largely, if not wholly, on the authority of the Gould case and of the decision of the case of the *Duke of Buccleuch v. Metropolitan Board of Works* in the English court of exchequer (L. R. 5 Ex. 221). But in 1872 that decision of the Duke of Buccleuch's case was, upon full consideration in the House of Lords, overruled, and the principles here contended for were carried to their full extent (L. R. 5 H. L. 418); and were still further elaborated and applied by the same great tribunal in the year 1876, in the leading case of *Lyon v. Fishmonger's Co., 1 App. Cas. 662.* And the Gould case, after having been a stumbling block to courts and lawyers for a generation, and after having been qualified, criticized and doubted repeatedly by the court that decided it, has at last met a deserved fate at the hands of that court, being deliberately overruled in *Rumsey v. New York &c. R. Co., 30 N. E. Rep. 654*, decided in April, 1892. There the court of appeals of New York fully discusses the principle involved and, in abandoning its former doctrine, follows the lead of this court in *Yates v. Milwaukee.* The mischief of the New Jersey decision was promptly cured by a legislative recognition of the right of access.

The supreme court of the state of Iowa also held, in 1871, in effect, that the owner of land bordering on the Mississippi has no private right in the waters, and cannot recover damages for being deprived of access by one acting under legislative authority.

Tomlin v. Dubuque &c. R. Co., 32 Iowa, 106.

But here that court, like the New Jersey court in the Stevens case, followed the lead of the Gould case. And so shocking to the general sense of natural justice was the effect of the Iowa decision, that the state legislature like that of New Jersey, speedily mitigated the harshness of the rule by the enactment of a statute guaranteeing to riparian owners compensation for the destruction of their rights of access.

Public Laws of Iowa, 1874, p. 28.

The case of *Ravenswood v. Flemings, 22 W. Va. 52*, claimed as an adverse authority, is not such in the point decided, which is simply that the state may prohibit the riparian owner from wharfing out—not that it may cut off his natural access. To this extent the decision is practically the same as that in *State v. Sargent, 45 Conn. 358*, rendered by a court which had expressly recognized the riparian owner's right of access (25 Conn. 346, cited *supra*).

But in so far as the West Virginia court, in its discussion of the general question, enunciates views adverse to the littoral right of access, we submit that relying mainly, as it does, on the Gould case since repudiated by the court that decided it, the Stevens case which followed the wrong lead of the Gould case and the subsequently reversed decision in the Duke of Buccleuch's case, and the Iowa cases which the state legislature promptly nullified, the West Virginia case must be regarded as an ill-considered one.

The decisions of this court, other than those in the Dutton, Schurmeir and Yates cases above cited, really contain nothing inconsistent with those. This court can find no difficulty in harmonizing them all ; but a few comments on some of those others will not be amiss.

The case of *Martin v. Waddell, 16 Pet. 367*, is really an authority in the plaintiff's favor. In effect it decides that the title to the bed of navigable waters is held by the sovereign for the protection of the public rights of navigation and fishery in the same, and that such title cannot be severed from the sovereignty so as to become vested, by grant or reservation, in a private person. The action was ejectment, and the court, deciding against the plaintiff, of course did not reach the consideration of the defendant's title to the oyster beds in controversy, which was founded on a grant from the state of New Jersey. The court simply decided that the plaintiff could claim no title under a grant from the Proprietors of East New Jersey, who, once possessed of both the sovereignty and proprietorship of the waters in question and the soil beneath them, had relinquished their sovereignty to the British crown but at the same time attempted to reserve their proprietorship. The court held, for the reason above stated, that the two could not be separated. Since, as we have seen, the private right of access is the necessary correlative and protection of the individual's share in the public right of navigation, that case, in so far as it has any bearing whatever upon the right of access, tends to uphold the right.

In *Pollard's Lessee v. Hagan, 3 How. 212*, this court held that a grant of tide land in Alabama, without upland, made by the United States, *after the admission of Alabama as a state*, was void. And this decision was placed, like that in *Martin v. Waddell*, upon the distinct ground that the proprietorship of the beds of its

navigable waters was an essential incident of the sovereignty of the state of Alabama, and that, were such proprietotship deemed to have been retained by the United States upon the admission of the state, the state would have failed of admission into Union, "on an equal footing with the original states."

In *Weber v. Harbor Commissioners, 18 Wall. 57*, this court, expressly reaffirming the doctrine of *Yates v. Milwaukee*, decided that, nevertheless, a grantee under the state of California of a lot lying wholly below the line of low tide took his title without incidental riparian rights, and subject to the control by the city of San Francisco (his immediate grantor), under state authority, of the water front beyond his property. Although the plaintiff's property was not originally upland, yet if the state or the city chose to grant him land, submerged but intended to be reclaimed, bordering on a highway by water, it is perhaps difficult to see why it would not be bound to preserve unimpaired his natural access to that water highway ; unless for the reason, which may be gathered from the case decided, that he must have purchased with full notice of the unrestricted proprietorship and control, by his grantor, of the water beyond. But at all events the Weber case, confined strictly to the point decided, does not militate against the right of access as incidental to upland contiguous to water, in the original condition of both ; and inasmuch as the opinion of Mr. Justice Field in that case quotes with approval the doctrine of *Yates v. Milwaukee*, and then proceeds upon a distinction in the facts, which distinction does not exist between the Yates case and the case at bar, the Weber case can carry no weight against the plaintiff's claim.

The case of *Barney v. Keokuk, 94 U. S. 324*, is not really adverse to the doctrine of a littoral right of access, for which the plaintiff contends. The action was ejectment by the riparian proprietor for premises below the water line of the Mississippi in front of his upland estate. The judgment for defendant, affirmed by this court, rested on the principle that the state is the legal owner of the soil beneath the water, and the rule laid down by the Iowa court that, where a street alongside a navigable river has been dedicated for public use as such, the city may put the street to public use as a space for wharves and railroad facilities, and may widen it on the water's side to enlarge its capacity for those purposes.

This court in its decision simply followed, as it felt itself bound to do, what was then the rule established by decisions of the Iowa courts.

Properly understood, the case of *McCready v. Virginia, 94 U. S. 391*, is equally harmonious with the principle contended for. Doubtless the legislature can prohibit any person, whether a citizen of another state or of its own, from exercising an exclusive right of navigation in any part of its navigable waters, or establishing an exclusive fishing ground in any part of the bed of those waters. But this is not to say that an individual citizen owning land bordering on those waters cannot insist on the right to use without hindrance the direct access to the waters—whereon he is a sharer in the general right of navigation—from his land that nature has endowed with the advantage of such access.

The case of *Hoboken v. Pennsylvania Railroad Co., 124 U. S. 656*, seems to have been that mainly relied on by the supreme court of the state as justifying its decision in the Eisenbach case. The question in the Hoboken case, however, was simply whether the state of New Jersey, as the superior of the city of Hoboken in the control over public rights, could wholly destroy the public right of passage over filled in up lands within the extension of a street beyond the end of it as originally dedicated. The railroad company claimed under the state, and no private citizen complained of deprivation of any special right on his part. The court is careful to say (p. 693):

"The right insisted upon in these cases by the city of Hoboken is the public right, and not the right of individual citizens, claiming by virtue of conveyances of lands abutting on streets made by Stevens or his successors in the title. The public right represented by the plaintiff is subordinate to the state, and subject to its control. The state may release the obligation to the public, may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may do in that behalf conclusively binds the local authorities when, as in the present cases, the rights of action asserted are based exclusively on the public right."

"And it might have been added" (says Stiles J., in his exhaustive dissenting opinion in the Eisenbach case, which refers to and harmonizes all these decisions and many others) "that the

legislature of New Jersey could have altogether destroyed the corporation of Hoboken, but it could not touch the right of a single lot owner, corporation or no corporation, to pass over his lot to the street, and thence abroad. The difficulty which the court finds in harmonizing *Yates v. Milwaukee* and the other leading cases in the United States supreme court with *Hoboken v. Railroad Co.* vanishes entirely when the right of a state to incumber a public highway, or to destroy it altogether, so far as the public right is concerned, is studied in connection with a case like that of Abendroth and the other New York elevated railroad cases, and the same principles are applied to both."

The argument in favor of a right of access receives additional support from the doctrine of title by alluvion or reliction, which has received the fullest recognition by this court.

New Orleans v. United States, 10 Pet. 662, 717.

County of St. Clair v. Lovingston, 23 Wall. 46, 68.

St. Louis v. Rutz, 138 U. S. 226.

The law gives the riparian proprietor title to land formed by these means, not only as a compensation for the loss which he may sustain by the destructive action of the current upon his land, but in order that his estate may continue to be, as it was when acquired, contiguous to the water—to the highway. In the case last cited the court says (p. 246):

"It may be asked, pertinently, what has become of the riparian rights of the plaintiff on the river, if his title to the land in dispute" (formed by alluvion) "is not sustained? . . . . The plaintiff was a riparian proprietor on the river. If his title to the land in question is not sustained, he is no longer such riparian proprietor and is *cut off from access to the river.* Among his rights as a riparian owner are access to the navigable part of the river from the front of his land, and the right to make a landing, wharf or pier for his own use or the use of the public."

Taking its decisions as a whole, and ascertaining the rule of the common law also from the leading decisions of the House of Lords and of many learned state courts of last resort, which we have cited, this court certainly cannot reach any conclusion other than that, by the common law as it must be deemed to have been in force in the territory of Washington when the plaintiff's littoral

estate first passed by grant of the United States, there was a right of property in the access to the navigable waters of the Sound, afforded by the natural situation of the premises. The court is not hampered in this case, as it may have been in *Barnes v. Keokuk* and *Hoboken v. Railroad Co.*, by any rule of property established by the state court which it would feel bound to follow. The rights claimed are older than the state or its courts. Such rights were never brought in question before the courts of the territory. And the only decisions of the supreme court of the state on the question are that in the case at bar and that in *Eisenbach v. Hatfield*, decided after the case at bar had reached judgment in the trial court and but a few months before its argument on the appeal. An opportunity is here presented to this court to set at rest forever all question as to the existence of property, which the state must respect, in the natural access between contiguous land and water.

3. But the plaintiff not only has a right to his access, but he has improved that access by erecting a wharf in aid of it, and in this also he has a right of property, and may maintain it.

The question whether the right of access to waters carries with it the right to wharf out into them, to an extent not injurious to the public right of navigation, has been frequently mooted in the courts of this country. The law of England seems to be, that the subject may wharf out from his upland to the line of low tide, without license from the crown ; and beyond that, so he do not interfere with navigation, *with* such license ; but that if he wharf out beyond low water, without license from the crown, even though the wharf be no obstruction to navigation and therefore no nuisance, it is a *purprestur*e, or invasion of the crown's dominion over the bed of the sea, which the king may abate, seize or arrent, at his pleasure. In this country the state would appear to have the same technial right as the crown in England ; yet in many of the states it is held that the littoral owner may wharf out so far as necessary to reach navigable water, not obstructing navigation ; and this court has in effect held that to be the general rule.

Dutton v. Strong, *1 Black*, *22.*
Railroad Co. v. Schurmeir, *7 Wall. 272.*
Yates v. Milwaukee, *10 Id. 497*, *504.*
St. Louis v. Rutz, *138 U. S. 226*, *246.*

See *Diedrich v. N. W. U. Ry. Co.*, *42 Wis. 248*, *262*.

In view of the technical doctrine of *purpresture* in England (which, however, has for the most part become a mere legal abstraction), this rule of American law must be founded, apparently, on the theory of an implied license from the state to the littoral owner, for the general encouragement and promotion of navigation and commerce, to wharf out without express permit, so long as he does not interfere with navigation by others. It is difficult to see any other foundation for the doctrine, consistent with legal theory and with the admitted ownership by the state of the fee of the waters; for we must concede that no such right to wharf out on submerged land owned by the state, beyond the line of low tide, logically flows from the abutting upland owner's mere right to enjoy the access to the waters that their natural contiguity to his estate affords him.

But the question is irrelevant to the plaintiff's rights. He has acted under express license, as well as long continued acquiescence by the former government of his commonwealth. The first legislative assembly of Washington territory passed, in 1854, what is known as the "Wharf Act" (see appendix to this brief, p. 111), which permitted any person owning land adjoining any navigable waters within the territory to erect upon his own land any wharf and extend it so far into the waters as the convenience of shipping might require, and to charge for wharfage such rates as should be reasonable, provided that he should at all times leave sufficient room in the channel for the ordinary purposes of navigation.

This statute was in existence when the plaintiff, more than thirty years ago, built his wharf and dock. Whether the statute was but a legislative declaration of a common law right, or a permission to do something not granted by the common law, it equally held out its invitation to the plaintiff and hundreds of others owning property washed, like his, by navigable waters. On the faith of it he and they expended their money in improving their water frontage so as to render more practicable and valuable their access to and from the sea, and render more approachable from the sea, the "highway of nations," their remote and then unpenetrated land. But for the development of navigation and commerce promoted by them under the guaranty of this statute, the state of Washington doubtless would not yet have come into existence. They made

these improvements for private profit it is true, but no less upon valuable considerations moving to the territorial commonwealth, because without improvement of the access between sea and land by private land owners no practicable access would have been established or used, and no commonwealth would have built up. More than this, the territory, later on, exacted a distinct return to the public for the concession of this privilege, if such it was; for in 1860 the legislative assembly passed another act (see appendix to this brief, p. III, *ad fin.*), which, unlike the first, required of the owner of every wharf extended *from private property* that he should grant free use of the same for the embarking and debarking of passengers with their baggage.

The state, by its Board of Harbor Line Commissioners and its attorney-general, now seeks to repudiate the territorial wharf act of 1854, contending, first, that the statute was at most a license, and revocable at any time, and secondly, that it was void, being beyond the competence of the territorial legislature to pass any *interest* in the seashore.

(1) The situation, however, presents all the elements of an equitable estoppel, on which the courts uniformly decline to allow the revocation of an executed license. If it be true that the law was a mere license, yet it has been acted under, at large expense, and structures have been built on the faith of it, over waters the bed whereof is vested in the state—structures that cannot be removed, and if removed would be worthless elsewhere. Thus the "license" became "coupled with an interest," and hence is irrevocable. The case is almost strictly parallel with that of *United States v. B. & O. R. Co.*, cited below.

13 Am. & Eng. Enc. Law, title License, VI, n. 1 (p. 541).

3 Kent's Comm. (13th ed.) 452, and n. 1.

Liggins v. Inge, 7 Bing. 682.

Vechte v. Raritan Water Power Co., 19 N. J. Ch. 142, 155.

Dark v. Johnston, 55 Pa. St. 164, 169.

United States v. B. & O. R. Co., 1 Hughes, 138, 145–8.

(2) The powers and limitations of the territorial legislature are laid down in section 6 of the organic act (1853), now incorporated into § 1851 Rev. Stats.:

"The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil . . . . "

The matter in question is a rightful subject of legislation; there is nothing in the constitution and laws of the United States with which such legislation is inconsistent; and the phrase "primary disposal of the soil" has no application to the shore strip, but relates solely to the fast land of which the United States has the rightful primary disposal, and which Congress thus expressly excepted from its delegation of power to the territorial legislature.

More than this, the wharf act does not interfere with the primary disposal of the seashore. It passes no title to the soil; it simply imposes a *quasi*-easement upon it. The territorial legislature could establish highways over the public domain; through its subordinate political machinery, the county governments, it laid out such roads and opened them in hundreds of instances. Suppose a case where such a highway was laid out through section 16 in a township (that section in each township being reserved by the United States to be granted to the future state as school lands), and extending thence eastward into section 15. Will it be claimed that the state, on being afterwards admitted to the Union and vested with the school lands, can close up the highway across section 16, claiming that the acts of the territorial organization in opening it were void as an interference with the "primary disposal of the soil," and thus cut off, without compensating him, the sole access of a settler to his farm in section 15? Yet the case is an exact parallel of a repudiation by the people of a state of a grant by themselves, in their former capacity as a territorial organization, of an easement over the seashore.

But the state contends that the territorial government could not grant this easement because it was a mere creature of Congress, and Congress itself could not have done it. Such a position is untenable. Congress cannot indeed grant away the fee of the beds of navigable waters in a territory, because that would be to deprive the future state of a title that is an inseparable incident of sovereignty. But Congress can grant, and has granted ever since it began, easements over the beds of waters, both territorial and state, to abutting upland owners, to build and maintain bridges

for transit over those waters. This it can do, because it is in aid of commerce and navigation, over which Congress has undisputed jurisdiction. And it is to the same end that the territorial legislature, under its delegated power, granted the right to wharf out as far "as the convenience of shipping may require." To admit the incapacity of Congress or its agent to do as much as this, would be to say that the United States has no power to build a wharf of its own in territorial waters, but, if it does so, must forfeit that wharf to the state which it afterwards calls into being.

The state is bound by the force of the statute, as well as by the highest obligations of honor and equity, to observe good faith toward those who have been thus led on to develop the means of navigation. But, more than all this, the equities, were they nothing more, grown up under the wharf act have been recognized *by the state*, in the act for the appraising and disposing of the tide and shore lands, approved March 26, 1890 (see appendix to this brief, pp. V–VII). Section 6 of this act provides that these lands shall be appraised "excluding the improvements from such valuation." And section 11 provides "That if valuable improvements in actual use for commerce, trade or business have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved" within a time limited.

Then the state does not claim that *it* is the owner of the improvements. Yet it claims to and does own the fee of the bed. And the improvements are beyond doubt so attached to the realty as to have become part of it. Yet those who have built these improvements, under authority of the wharf act, are termed by the state the *owners* thereof. There could be no clearer recognition by the state of the fact that, by the actual making of improvements under the sanction of the wharf act, an interest has arisen —a right of property has become vested.

But further: The "tide-land act" of 1890, even if it recognized no existing property right in the prior improver, creates one by its own express provision in his favor. Even if the legislature regarded him as a mere intruder on the shore, under the sanction of no valid law, it recognized the fact that he was there, and had expended money to build there, and by its enactment it *vested in*

him a prior right of purchase of the bed, at its appraised value exclusive of his improvements.

It is true that the construction placed upon this state statute by the state supreme court is conclusive here; and so we are not seeking here to ground a property right upon this statute. But this legislation of the state may properly be taken into account by this court as a recognition of the rights based upon the territorial wharf act; and it is under the latter that the plaintiff insists he had acquired, before the state constitution was framed, a vested right in his wharf, superadded to his right to the enjoyment of the natural and undeveloped access to the waters of the Sound from his land. For the deprivation of both of these rights, or their impairment, he claims that he must be compensated in advance; and although the state supreme court assumed, in the argument of its decision, that he had a right of property in his wharf, yet it practically denied that right by denying his right of unobstructed access to the sea. This is the larger right, embracing the right to the wharf; and its denial is in effect a repudiation also of the plaintiff's claim that his wharf is his property.

Langdon v. Mayor &c. of New York, 93 N. Y. 129.

St. Louis v. Myers, 113 U. S. 566.

THIRD.

The effect of the execution of the plan embodied in the constitutional and statutory provisions under which the Board were appointed, and in the tide-land act of 1809, will be to deprive the plaintiff of property without compensation and without due process of law.

The question here to be discussed is simply whether the full execution of the plan of the state inaugurated by its constitutional provisions as to harbors and tide-waters and the statutes in furtherance thereof will amount to a deprivation of the plaintiff's property rights. It must here be assumed that the existence of the plaintiff's asserted rights of property has been established by the preceding argument; and the question whether the immediate step on the part of the Commissioners, which the writ of prohibition intervened to prevent, would of itself go so far toward the taking of the plaintiff's property as to entitle him to arrest it until compensation should be made, must be reserved for the next and concluding branch of this discussion. Here we are concerned only

with the question of the effect of the complete execution on the part of the state of its plan of control of the water front.

The plan involves two things:

First, the setting apart of a harbor strip or area, which the state shall not sell or grant, but shall forever reserve "for landings, wharves, streets and other conveniences of navigation and commerce," and may, under general laws, lease for a term not exceeding thirty years, for the building and maintaining of wharves, docks and other structures thereon, or may itself, under general laws, so improve.

Secondly, the absolute alienation into private hands of the title and use of the remaining shore and tide-lands, and, it may be, lands wholly covered with water, intervening betweeen the inner line of the harbor strip and the line of high tide, or boundary of present private ownership.

The first feature of this plan is expressly prescribed by the constitution; the other is permitted by it.

The plaintiff now has, it must here be assumed, an absolute right of direct and unobstructed access from the frontage of his upland outward, over the shore strip and the waters, to the deep-water navigation of the sound; and an absolute right to maintain his wharf which utilizes that access. When the plan of the state shall have been carried out, so much of his wharf as projects beyond the inshore line of the harbor strip will be embraced within an area that the state will either be in possession of, developing upon it wharves and other instruments of navigation and commerce, holding these with the right of exclusion that is inherent in every right of property coupled with possession, and admitting the plaintiff as well as others to entrance upon it and transit over it to the sea only upon such terms as the state may see fit to pre-prescribe; or the state will have leased that area to private parties, their possession under the lease carrying with it the like right of exclusion, and the like right to prescribe terms of the plaintiff's entrance upon and transit over the area. The leasing contemplated by the constitution involves the idea of the payment of a rental or other consideration by the lessees. The payment of a rental contradicts the idea that the area, improved by the lessees, must be thrown open by them to all comers without compensation. The plaintiff, then, will have some burden, at least, imposed upon the

enjoyment of his access from his upland frontage to deep water. It matters not that he may have access on the same terms as all others of the public. He now has the right of *free* access. The imposition of a burden or tax upon the enjoyment of that right will be *pro tanto* a deprivation of that right.

Next, so much of the plaintiff's wharf, and of the shore strip and the permanently submerged land across his frontage, as lies between the line of high tide—the boundary of this estate in fee—and the inner line of the harbor strip, will have been alienated by the state, and will have become the fee estate of private parties, their ownership thereof carrying with it the right of complete exclusion of the plaintiff and all others; and the plaintiff can enter upon this tract, and cross it to the sea, only upon such terms as its owner may dictate, even the state reserving no control of this property. As to this tract of shore and submerged land, lying between his upland and the harbor strip, the plaintiff, it is true, as both the owner of the abutting upland and the possessor of the existing improvements upon the tract, has, under the tide-land act, a prior right of purchase at an appraised value within a limited time. But the granting of this pre-emptive right does not leave him free to enjoy, as before, his access to the sea without burden. It merely permits him to acquire, upon terms (perhaps beyond his financial ability to comply with), a new right of access —and that only as far as to the harbor strip. This, again, amounts to the imposition of a burden upon the continued enjoyment of his access to the sea; and deprives him, *pro tanto*, of his existing right to that access.

For it must be understood that this scheme of the state does not contemplate a mere harbor line. It is not a mere regulation or restriction of the building of wharves by upland owners, in aid of their access. If the Board were empowered to do no more than that, the plaintiff could not complain.

Commonwealth v. Alger, 7 *Cush.* 71.

Dillon on Mun. Corp. (*4th Ed.*) § 107.

Here there is to be not only a harbor line but a "harbor strip," or area, which the state or its lessee is to "improve" and possess, with the right of excluding transit across it except upon terms. And there is to be an alienation of what lies between that and the line of high tide, which the state's grantee will possess, with the right

of *absolute* exclusion from it. These features of the scheme broadly distinguish the case from that last cited.

But it will be said that, apart from the plaintiff's improvements (his property in which will be denied), all this does not *take away* any of his property. His upland estate remains untouched; the inner line of the harbor strip does not and cannot lie above the line of high tide, and the plaintiff does not profess to be the owner of any land below that line—he concedes that the title to that is in the state.

The plaintiff's access, however (in which, we here assume, it has been demonstrated that he has a right of property), is cut off. While it is true that his upland estate is untouched, that right of access is an incident of his upland estate; it is a part of his property therein, though this property right is not exercised upon his land, but from it outward over the water.

"In a strict legal sense, land is not 'property,' but the subject of property." "Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. . . . . As regards real property, in addition to the rights already enumerated, which pertain to the use and disposition of that limited area which a man calls his own, there are others which pertain to the use which may legally be made of contiguous and surrounding areas, and which form an important part of that aggregate of rights constituting property in land."

Eaton v. B. C. & M. R. Co., 51 N. H. 504.

Lewis on Eminent Domain, § 54.

Under the decisions of this court, and of the courts of many of the states whose constitutions contain merely the narrow restriction upon the exercise of the eminent domain that "private property shall not be *taken* for public use without just compensation," it has been held that the deprivation of the right of access is a *taking* of property, and falls within the constitutional right to compensation.

Yates v. Milwaukee, 10 Wall. 497, 504, 507.

Story v. N. Y. El. R. Co., 90 N. Y. 122.

Abendroth v. same, 122 Id. 1.

Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214.

"When it is conceded that riparian rights are property, the question as to the right to take them without compensation would appear to be at an end."

Gould on Waters (2nd ed.), § 151.

But the constitution of the state of Washington puts this right on a more incontestable basis. It is among the latest of twelve or more constitutions, beginning with that adopted by the state of Illinois in the year 1870, which have broadened the right to compensation by declaring, in substance, that "No private property shall be *taken or damaged* for public use without just compensation." This is the exact language of that clause in the constitution of the state of Washington. (See appendix to this brief, page 1.)

This clause has received construction in nearly all of the states which have adopted it; and their courts have uniformly given it a broader scope than that accorded to the older provisions which contain only the word "taken." It is sufficient here to refer, in support of this statement, to the highway cases cited on page 24 of this brief. We might well go further and say, that in this case the private property will be taken or damaged, not for public but for private use, by the alienation to private individuals of the intervening shore land, involving the destruction or impairment of the plaintiff's access to the sea, and that hence the state has no right, even upon making compensation, to carry out the plan outlined in its legislation. But passing this objection, we submit that the plaintiff will undoubtedly, by the consummation of the policy which the state of Washington has seen fit to inaugurate respecting its shore lands and navigable waters, be deprived of his rights of property in the access to the sea from his frontage, and in the wharf that he has erected on the shore upon the faith of the territorial statute and in which the statute of the state has recognized his interest.

Since the constitutional and statutory provisions of the state embodying this policy make no provision at all for compensation to the plaintiff, but on the contrary ignore his rights that it will affect and tacitly deny that he has any, and since no statute of the state entitles him to institute a proceeding by which to obtain compensation, it is clear that the plaintiff's rights of property will be taken away or damaged without compensation, if the state is permitted to go on. And the constitution of the state expressly re-

quires that in all cases the compensation shall be made *in advance* of the appropiation or injury.

The constitution of the United States, however, does not expressly impose upon the states the obligation to compensate for either the taking or the damaging of private property for public use. But in effect it requires this, in its mandate that no state shall "deprive any person of . . . . property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Especially is this the force of the mandate as against a state which has in its own constitution guaranteed to all persons compensation for their property divested by the eminent domain.

We have found but two cases, and those in the inferior federal court, in which it has been squarely held that taking private property without compensation is taking it without due process of law.

State v. Walruff, 26 Fed. Rep. 178, 199 (per Mr. Justice Brewer).

Scott v. Toledo, 36 Id. 385, 392.

But this doctrine has been intimated elsewhere.

Cooley's Const. Lim. (6th Ed.), p. 435.

Davidson v. New Orleans, 96 U. S. 97, 102.

Depriving property of one of its essential attributes or incidents has been held to amount to depriving the owner of his property without due process of law.

People v. Otis, 90 N. Y. 48, 52.

And in a recent decision of this court the whole discussion, both in the briefs of counsel and in the opinion of Mr. Justice Brown, proceeds on the assumption of this doctrine; the court saying that the court below could not have reached a conclusion adverse to the defendant company without holding, "either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law."

Kaukauna Water Power Co. v. Green Bay &c. Canal Co., 142 U. S. 254, 269.

Besides, not only do the state constitution and statutes in ques-

tion make no provision for compensation, but they do not provide for notice to the littoral proprietor of the steps prescribed; they treat him as one having no voice in the matter; and the Board of Commissioners were about to carry into execution that part of the plan committed to their charge, without any notice to the plaintiff or others in like situation. But notice and opportunity to be heard are essential to "due process of law."

Langford v. Commissioners, 16 Minn. 375.

Stuart v. Palmer, 74 N. Y. 183, 190.

Thus the plaintiff invokes the protection of this court against the decision of the supreme court of his own state in denial of his rights, not only because that decision upholds a course of action on the part of the state which amounts to an interference with the plenary and exclusive control of Congress over the regulation of commerce and navigation, a power now brought into exercise in respect to all harbors and wharves in all navigable waters; but because the plan of the state upheld in that decision will involve the destruction or impairment, without providing any compensation to him therefor, of the plaintiff's free access to the waters that wash his land, and the consequent destruction of the value to him of the improvements that he has erected, under the permission of a territorial law, to facilitate that access—both of which are his property; such deprivation of his rights, without compensation, and without notice or opportunity to be heard in defense of those rights, being a deprivation without due process of law. It only remains to determine whether that step in the execution of this plan of the state which was about to be taken, when the writ of prohibition intervened, of itself went so far toward the taking or damaging of the plaintiff's property that he had a right to arrest it, and whether he could arrest it by the writ of prohibition.

FOURTH.

The plaintiff in error is entitled to invoke the writ of prohibition to prevent the contemplated action of the Board of Harbor Line Commissioners.

1. The state supreme court held in this case that "It does not follow from such an including of the shore and submerged land under the plaintiff's wharf within the harbor line that the state has or ever will interfere with his ownership or possession of said

wharf." This view is simply a factor in the decision of the court below that no property of the plaintiff would be taken or damaged by the act sought to be prohibited—a decision that the plaintiff will be deprived of no rights within the prohibition of the fourteenth amendment. Hence this ground of the decision below is only a part of its decision on a federal question, and not a decision on a separate question of general jurisprudence, which, being for that court alone, might preclude this court from reaching the federal questions.

See *Ohio Life and Trust Co. v. Debolt, 16 How. 416, 433.*

The defendants profess themselves as desirous as the plaintiff that this court shall reach and decide on its merits the central question involved, as to the existence of a right of property in the littoral proprietor's access to navigable waters. Hence the question whether the threatened filing of the map of the harbor strip was such an overt act of appropriation or damaging of the plaintiff's property rights as to entitle him to seek protection does not call for extended discussion. Still, the plaintiff's theory of the case should be stated.

The effect of the execution by the Commissioners of the powers conferred upon them is declared in the last clause of section 3 of the statute (appendix, page IV):

"From and after the filing of said plat, the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this state."

And section 5 of the "tide-land act" (appendix, page V) provides that the board of appraisers of tide-lands shall meet within thirty days after the location of the harbor lines in front of incorporated cities and towns, and organize; and the act further directs that they shall thereupon appraise and classify the tide-lands, and prescribe the steps by which they may and shall be sold.

Thus the completion of the duties of the harbor line commissioners, in respect to the waters in front of any city in the state, by the adoption and filing of their map of the harbor lines and harbor area determined upon, effects in law a complete segregation of that area from the remainder of the bed of those waters. Thereupon, without further legislation than is already on the

statute book, the shore intervening between that harbor area or strip and the line of high tide can and will be sold by the state, by means of a series of purely ministerial acts already prescribed by the legislature.

And the harbor area itself, so designated and set apart by the filing of the map, is subject to be leased by the state without further judicial action, through no other means than the enactment by the legislature of a general law for such leasing and the performance of such ministerial acts for the selection of the lessee, the fixing of the rental and the execution of the lease, as the legislature may prescribe. Or, the legislature may determine that the state shall itself "improve" the area by the erection of wharves and other structures thereon ; and the execution of such a plan, equally with the leasing of the area to private parties, will effect an interruption, or a total destruction, of the plaintiff's existing access to the sea.

In point of fact, since this writ issued, the state legislature has enacted another statute on the subject, providing for the improvement by the state, through the administration of the Board of Harbor Line Commissioners, of the area comprised between outer and inner harbor lines located by them ; and setting apart as a special fund for that purpose seventy-five per cent of the proceeds derived by the state from the sale of tide-lands along the frontage of the several cities. (See appendix, pages VII, VIII.)

If the plaintiff did not prevent the commissioners from fixing the location of the harbor strip by filing their map, it is difficult to see at what stage in the course of proceedings he could afterwards intervene more effectively or more fitly, for the protection of his rights.

As to the sale of so much of the shore and submerged land across his frontage as is not embraced within the harbor strip, it cannot be said that he should prevent others from purchasing and taking possession of that, and thus interrupting his access to the sea, by becoming the purchaser himself, under the pre-emptive right given him by the tide-land act ; for to say this would be to assume that he has not already a *right* of access, but must insure his enjoyment of the access by a purchase from the state—which is the chief point in controversy. Upon others' purchasing the shore, and entering into possession, certainly he could not sue themin tres-

pass or ejectment, for he does not claim to own the fee below the line of high tide. It is equally clear that he could not enjoin their erections as a nuisance, since they would claim the protection of title acquired under authority of the state. His only remedy wou be to bring suit for his special damage caused by the purchasers'ld building in front of him, on the ground of nuisance. But this would be a remedy available only after the damage to his rights of property was inflicted ; and the constitution guarantees him compensation in advance.

See *Lewis on Eminent Domain*, § *116 ad fin.* (*p. 153*).

The case is still more serious as to the interruption to the plaintiff's access that would be caused by the improvement of the harbor strip under the direction of the commissioners, pursuant to the statute of 1891. They being a board of public officers, he could not enjoin them from the improvement, their acts in that regard being merely ministerial ; or, if he could enjoin them at all, it would be on the same ground upon which he now seeks a prohibition—that, so far as it affects his rights without compensation, the statutory authority of the commissioners is unconstitutional.

The truth is, that the step about to be taken by the commissioners when the writ of prohibition stayed their hand was the first overt act on the part of the state's agents in a course of proceeding that would have culminated in the deprivation or great impairment of valuable property rights of the plaintiff, without any compensation to him. That was the time for him to seek judicial protection for his rights. Had he lain by and waited till the segregation of the harbor area was an accomplished fact and the "improvement" of it was about to be undertaken by the state, he would probably have been held, in any proceeding then instituted, to have acquiesced in the appropriation and waived his right to prior compensation, and to be remitted to his action for damages. The decision by the board as to the location and extent of the harbor strip, and the embodiment of that decision in a map certified and filed by them in the public offices, would have been, in fact, a notice by the state that it appropriated that area for its scheme of harbor improvement to remain under its own dominion, and that it thereby set it apart and would hold it free of any upland owner's asserted right of access across it to the navigable waters of the Sound. This view is supported by the grounds of the decision of this court in a late important case.

Kaukauna Co. v. Green Bay Co., 142 U. S. 254, 269–70.

The court below was inclined to treat the question, however, as one of cloud on title. If it were such, there is no doubt that practically the filing of the map would have cast a most serious cloud upon the plaintiff's title to his incidental right of access and to his wharf improvement. However the matter may stand in its judicial aspect, there is no sort of doubt that the day after the filing of such a harbor map the market value of the wharf and of the land connected with it would have been vastly less than the day before, and by reason of the assertion on the part of the state, spread upon the public records by the map, that the plaintiff's property in his wharf and in an easement of access was denied and would be contested. And there are cases which support the view that such a map of record would stand not only before the business community but before a court of equity as a cloud upon the property rights mentioned.

Linnell v. Battey, 21 Atl. Rep. 606 (R. I.).

Murphy v. Stmpson, 42 Mo. App. 654.

Bulwer C. M. Co. v. Standard C. M. Co. 83 Cal. 589.

Kittle v. Bellegarde, 86 Id. 556.

But it is not properly a question of cloud on title, which is of equitable cognizance. The plaintiff is asserting a *legal* right, and pursuing a legal remedy. Prohibition aims at restraining the possessor of judicial authority from an excess of jurisdiction. Its use does not require the existence of grounds of equitable jurisdiction. It is not confined to a case where the act in excess of jurisdiction would be apparently valid and hence would cloud a title of him who sues out the writ. This is familiar in cases where the writ is, perhaps, most frequently used—to restrain an inferior court or magistrate, as, a justice of the peace, from rendering a judgment in excess of jurisdiction. If the writ were not sued out and the judgment were rendered, it would be void, lacking jurisdiction. It would be no protection to the party obtaining it and issuing and levying an execution under it. Yet he against whom the judgment would run is entitled to a writ of prohibition, although the judgment would be invalid and ineffectual against him for defect of jurisdiction. The remedy of prohibition exists that inferior courts and others exercising judicial power may be

kept within the limits of their jurisdiction ; and the mere convenience of a private person against whom the void judgment would run is enough to entitle him to the writ, though his substantial right could not be prejudiced. "It is better to stop action at once, even though such action would be void, than to allow proceedings to be had which would subject . . . . others to inconvenience and litigation."

Sweet v. Hulbert, 51 Barb. 312, 315.

2. Assuming that the plaintiff's rights were about to be invaded, and that he was entitled at that time to invoke the protection of the courts, there might still be a question whether a writ of prohibition would lie in such a case. This question, however, is not properly before this court for consideration at all; because the court below did not hold that the writ would have been an inappropriate remedy, had the plaintiff made out the case of rights on his part, and threatened invasion of them, that he claimed. All that the court said about the writ was this :

"The extraordinary writ of prohibition should only be granted in a clear case, and when no other remedy is available ; and I am of the opinion that petitioner has no cause of complaint ; and if he has, I am not satisfied that the ordinary proceedings in law or equity will not ultimately completely protect his rights."

There has been no decision, then, that the courts of the state would not have allowed the writ, had their view of the substantive law of the case been other than it was. Still, it may not be amiss to state briefly here why the writ was the proper remedy for the plaintiff to seek.

If it has been shown that a legal wrong exists, there must be a remedy. *Ubi jus, ibi remedium.* What remedy, then? The wrong-doer is not the adversary party ; that is the state. The wrong-doer is a board of public officers having judicial functions. Injunction does not lie against such a body. Mandamus is not applicable : the force of that writ is affirmative. What is required here is to prevent.

The writ of prohibition is an extraordinary judicial writ, issuing out of a court of superior jurisdiction and directed to an inferior court, for the purpose of preventing the inferior court from usurping a jurisdiction with which it is not legally vested.

High's Extr. Legal Remedies, § 762.
Short's Extr. Remedies (*Am. Ed.*), *p.* 426.
Mayor of London v. Cox, *L. R.* 2 *H. L.* 254.

The Board of Harbor Line Commissioners are a *judicial body.* They are so, because the powers devolved upon them are judicial in their nature. Their duty, under the constitution and the statute of 1890, is "to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side." They must first judicially determine what is within their jurisdiction, by judicially ascertaining what are the corporate limits of cities within or in front of which navigable waters lie. Then, the inner line of the harbor area, reserved from sale and subject only to lease, shall be—so says the constitution—"within not less than fifty nor more than six hundred feet of such" (outer) "harbor line (as the commission shall determine)." This requires judicial inquiry into and determination of the proper location of the outer line and the proper width (within limits prescribed) of the strip. This is not to be determined by rule of thumb—no rule has been laid down for their guidance by either constitution or statute. It has to be determined by considerations of suitableness, of economy, of equity ; considerations that would have no part in guiding ministerial officers, whose path is a path laid down by the law to be pursued rigidly under circumstances that the law also prescribes. Within certain limits, as to the width of the strip, the constitution leaves to the board of commissioners absolute discretion in the location of both inner and outer harbor lines ; a discretion that, so long as they act within the powers that the law can give them, can be neither questioned nor controlled. Such independent discretionary powers must be either legislative or judicial ; they are foreign to the idea of ministerial or executive action. It is not claimed that the powers of the board are legislative. Then they are judicial.

The board are an "inferior" judicial body, notwithstanding they are created, like the courts of general jurisdiction, by the constitution of the state. So are justices of the peace, yet the writ of prohibition runs to them. "Inferior" does not refer to the source of title, but to a limited as distinguished from a general jurisdiction.

The writ, as at common law, is sanctioned by a statute of the state, and intrusted to the superior courts.

Washington Code 1881, § § 689–90, 698–701.

The writ is not restricted in its operation to courts *eo nomine.* It may issue against any inferior judicial board or officer, as well as against any inferior court.

38 Am. Dec. 594, note.

Shortt on Extr. Rem. (Am. Ed.), pp. 427, 431.

As, against a board of railway commissioners.

Shortt, p. 434.

Toomer v. Ry. Co., L. R. 2 Ex. 450.

Canal Co. v. Canal Co., 5 Ex. D. 1.

Railway Co. v. Railway Comrs., L. R. 6 Q. B. D. 586.

Or against "Inclosure and Improvement Commissioners."

Shortt, p. 433.

The writ is the proper remedy when, having jurisdiction, the inferior tribunal assumes to exercise an unauthorized power, or is proceeding to do an unauthorized act. "The writ will be awarded in cases where such tribunal has jurisdiction, as well as where it has not jurisdiction."

Hawes on Jurisdiction, §§ 155, 156 et seq.

Wood on Mand. & Proh., p. 148.

Appo v. People, 20 N. Y. 531.

Thomson v. Tracy, 60 N. Y. 31, 37.

Lord Mansfield instanced the misconstruction of an act of Parliament as a ground for prohibition.

Fall v. Hutchins, 2 Cowp. 422.

See *Juxon v. Byron, 2 Lev. 64.*

"There occasionally occurs a state of affairs and an emergency, when this remedy is remarkably appropriate and its operation salutary. Hence, the infrequency of its use argues nothing against the validity or value of the process when appropriately applied."

People v. Clute, 42 How. Pr. (N. Y.), 158.

The writ lies before judgment below is rendered or executed, not after.

United States v. Hoffman, 4 Wall. 158.

Shortt, pp. 458–9.

But a judicial judgment is not a mental act, but the promulgation of that act and the making it a matter of record. The harbor line map when filed would be both the announcement and the entering of the judicial decision of the Board, just as in the case of a judgment of a court of law. Till then the matter would be still within the breast of the board, subject to further consideration and a different outcome.

And the prohibition may be absolute, or only till some act be done.

Shortt, p. 453.

Bacon's Abridgement, Vol. 8, tit. Prohibition (F).

The board being a judicial body, if the argument already made holds good their threatened action is in excess of their powers and jurisdiction : both because that action transcends a constitutional limitation—the requirement that the plaintiff shall not be deprived of his property without due process of law—and because it is an invasion of a field in which Congress has exercised its plenary and exclusive power. No court or judicial officer has jurisdiction to do that which the law forbids; much less that which the fundamental law, giving life to the government whereof he is a member, forbids. There is nothing in the proposed action of the Commissioners in excess of the powers that article XV of the state constitution, standing by itself, confers upon them. But that article was not self-executing. It called for legislation to set those powers in motion. The same constitution elsewhere forbade that private property should be taken or damaged for public use without just compensation being first made. The legislature, in seeking to give life and activity to the commission whose powers the constitution had conferred, neglected to provide the Commissioners with means whereby they could exercise those powers, where the exercise would involve the taking or damaging of private property, without disregarding the constitutional requirement that prior compensation must be made. Hence, they cannot now exercise those powers at all so as to affect injuriously the plaintiff's

property, without violating the fundamental law and thus exceeding their powers and jurisdiction. This is why the board are unable to act as the constitution directed that they should. The fault lies with the legislature.

Their inability to act under the state constitution and statute without invading the province of Congress is a defect of power that goes deeper—that no state legislation can cure.

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APPENDIX.

State Constitutional and Statutory Provisions.

CONSTITUTION OF THE STATE OF WASHINGTON.

ARTICLE I.

DECLARATION OF RIGHTS.

. . . . . .

Sec. 16. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

. . . . . .

ARTICLE XV.

HARBORS AND TIDE WATERS.

Section 1. The legislature shall provide for the appointment of a commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof upon either side. The state shall never give, sell or lease to any private person, corporation or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than 600 feet of such harbor line (as the commission shall determine) be sold

or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce.

SEC. 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures, upon the areas mentioned in section 1 of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks and other structures.

SEC. 3. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

ARTICLE XVII.

TIDE LANDS.

SECTION 1. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

SEC. 2. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided*, The same is not impeached for fraud.

ARTICLE XXVII.

SCHEDULE.

In order that no inconvenience may arise by reason of a change from a territorial to a state government, it is hereby declared and ordained as follows:

SECTION 1. No existing rights, ... contracts or claims shall be affected by a change in the form of government, but all shall continue as if no such change had taken place; . . . . .

SEC. 2. All laws now in force in the Territory of Washington, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: *Provided*, That this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide-lands to any person, company or any municipal or private corporation.

. . . . . .

STATUTES.

LAWS OF WASHINGTON TERRITORY.

(Session Laws 1853–4, p. 357.)

AN ACT to authorize and regulate the erection of wharves.

SECTION 1. Any person owning land adjoining any navigable waters or water course, within or bordering upon this territory, may erect upon his own land any wharf or wharves, and may extend them so far into said waters or water courses as the convenience of shipping may require; and he may charge for wharfage such rates as shall be reasonable: *Provided*, That he shall at all times leave sufficient room in the channel for the ordinary purposes of navigation.

SEC. 2. Whenever any person shall be desirous of erecting upon his own land any wharf, at the terminus of any highway, or at any accustomed landing place, he may apply to the county commissioners of the proper county, who, if they shall be satisfied that the public convenience requires the said wharf, may authorize the same to be erected and kept up for any length of time not exceeding twenty years. And they shall annually prescribe the rates of wharfage, but there shall be no charge for the landing of passengers and their baggage.

SEC. 3. Every person building or occupying a wharf, built according to the provisions of the preceding section, shall post up in a conspicuous place thereon a table of the rates chargeable by law, upon which table passengers and their baggage shall be marked free.

(Session Laws 1859–60, pp. 326–7.)

AN ACT to amend an act, entitled An Act to authorize and regulate the erection of wharves.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington*, That the third section of the act to which this is an amendment be, and the same is amended so as to read as follows: "Every person building, owning, or occupying a wharf in this territory, upon which wharfage is charged and received, shall be held accountable to the owner or owners, consignees or agents, for any and all damage done to property stored upon, or passing over said wharf, in consequence of the unfinished, incomplete, or insufficient condition of said wharf; and every such person shall post or cause to be posted in a conspicuous place on said wharf the established rates of wharfage, noting passengers and their baggage free."

SEC. 2: Irrelevant.

Passed January 28th, 1860.

LAWS OF THE STATE OF WASHINGTON.

(Session Laws of 1889–90, pp. 239–40.)

AN ACT to create a board of harbor line commissioners, prescribing their duties and compensation.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. There is hereby created a board of harbor line commissioners, to consist of five disinterested persons to be appointed by the governor.

SEC. 2. The said commissioners shall hold office until the 15th day of January, 1893. Should a vacancy or vacancies occur in said board, by resignation or otherwise, the same shall be filled by appointment by the governor.

SEC. 3. The duties of the said harbor line commissioners shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof upon either side, and to perform all other duties provided and prescribed in article 15 of the constitution of the State of Washigton, and all such other duties as the law may prescribe, and wherever and whenever said board of harbor line commissioners shall have established the lines as herein provided, in any of the navigable waters of the harbors, estuaries, bays and inlets of this state, they shall file the plat thereof in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the city or town where harbor lines shall have been located, and from and after the filing of said plat, the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this state.

SEC. 4. The board of harbor line commissioners, hereby created, shall begin operations as soon as may be practicable, and are hereby authorized to employ a clerk, a competent surveyor, and such assistance as may be necessary, and to purchase such material and supplies as may be necessary to carry out the full intent and purpose of this act, at such rates of compensation as they may deem advisable. To carry into effect the provisions of this act, the sum of six thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of the tide-land funds in the state treasury not otherwise appropriated.

SECS. 5–7: Irrelevant.

Approved March 28, 1890.

(Session Laws of 1889–90, pp. 431–7.)

AN ACT for the appraising and disposing of the tide and shore-lands belonging to the State of Washington.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The tide and shore-lands in the state of Washington shall be appraised, and the same shall be disposed of by the commissioner of public lands as in this act provided, which are not by the constitution and laws of the state reserved from sale.

SEC. 2. There shall be a board of equalization, which shall be composed of five members, as follows: The secretary of state, the state auditor, and three qualified electors, residents of counties of this state in which no tide-lands exist, who shall be appointed by the governor, and the same are hereby created a board of equalization and appeal as hereinafter provided, who shall serve for one year, or until their successors are appointed and qualified.

SEC. 3. The governor shall appoint, in each county of the state where shore and tide-lands exist, a board of appraisers consisting of three disinterested resident freeholders, whose duty it shall be to examine and appraise the shore and tide-lands in their respective counties, as hereinafter provided.

SEC. 4. For the purpose of survey and appraisal, the tide-lands of the State of Washington are hereby divided into three classes. The first class shall embrace all tide-lands situated within or in front of the corporate limits of any city, or within two miles thereof upon either side. The second class shall embrace all tide-lands situated at a greater distance than two miles from either side of an incorporated city or town, and upon which are located valuable improvements. The third class shall embrace all other tide-lands. Tide-lands of the first class shall be surveyed and appraised as rapidly as practicable, and the state board of equalization shall order such lands surveyed, as hereinafter provided. . . . . (The rest of this section provides for the survey and appraisal of tide-lands of the second and third classes.)

SEC. 5. Said board of appraisers shall meet at the county seat of their respective counties within thirty days after the location of the harbor lines in front of incorporated cities and towns, and, after taking an oath to support the constitution and the laws of Washington, and faithfully and impartially discharge their duties, shall organize by electing one of their number chairman and appointing a secretary. After the organization of the board as provided, they shall, within ninety days thereafter, examine, survey and appraise so much of the shore and tide-lands in their respective counties as lies within or in front of the corporate limits of any incorporated

city or town, and within two miles thereof, upon either side, and thereafter, from time to time, such other lands as application to purchase may render necessary, classifying the same and fixing the valuation of each lot, block or tract separately, noting the improvements thereon and by whom claimed, and excluding the improvements from such valuation.

SECS. 6, 7: Provide for preparation and filing of appraisers' plats of the shore and tide-lands.

SEC. 8. Any person, association or corporation entitled to purchase or hold real estate in the State of Washington, who shall desire to purchase under this act, may file with the commissioner of public lands an application to purchase any of the lands herein described, which application shall contain a description of the land applied for by metes and bounds. The commissioner of public lands shall furnish the state board of equalization and appeal with a true copy of said application. Upon receipt of said application the commissioner of public lands shall, at the expense of the applicant, publish for three weeks, in any newspaper printed in the county in which the land is situated, a notice of such application to purchase, with a description thereof. If, at the expiration of thirty (30) days, no notice of contest is filed with the said state board of equalization and appeal, said appraisement shall stand confirmed and be the price at which said land shall be sold, as hereinafter provided.

SEC. 9: Provides for contests as to right to purchase, etc.

SEC. 10: Provides for issuing of certificate to purchaser.

SEC. 11. The owner or owners of any lands abutting, or fronting upon, or bounded by the shore of the Pacific ocean, or of any bay, harbor, sound, inlet, lake or watercourse, shall have the right for sixty (60) days following the filing of the final appraisal of the tide-lands to purchase all or any part of the tide-lands in front of the lands so owned: *Provided*, That if valuable improvements in actual use for commerce, trade or business have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid: *Provided further*, That the occupant who has, prior to the passage of this act, planted oysters in any bay or arm of the sea upon ground not covered with natural oysters, or who has, prior to the passage of this act, acquired by purchase the rights of any other person or corporation to such occupancy, the same being not within, or in front of, the limits of any incorporated city or town, or within two miles on each side thereof, shall have the exclusive right to purchase the land so occupied for the period aforesaid, to an extent

not exceeding eighty (80) acres: *Provided*, That nothing in this act shall be so construed to apply to any improvements made after the passage of this act.

SEC. 12. When the abutting upland owner has attempted to convey by deed to a *bona fide* purchaser, any portion of the tide-lands in front of such uplands, or littoral rights therein, such right of purchase herein given to the upland owner shall be construed to belong to such purchaser, or to any person, association or corporation claiming by, through or under such purchaser, to the extent of the tract or rights so conveyed.

SEC. 13. In case the persons mentioned in sections eleven and twelve of this act do not, within the time limited, exercise the right to purchase herein given, then said lands shall be open to the public for sale as herein provided. . . . . (The rest of this section prescribes the mode of public sale.)

SECS. 14, 15: Irrelevant.

Approved March 26, 1890.

(Session Laws of 1891, pp. 405–6.)

CHAPTER CLIX.

AN ACT relating to the improvement of harbors and waterways in the State of Washington, and providing funds therefor.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That seventy-five (75) per cent of the proceeds derived by the state from the sale of tide-lands within the limits of any incorporated city or town in the State of Washington, or within one mile on either side thereof, shall be, and the same is hereby, appropriated and shall be set apart as a special fund by the state treasurer for the construction and maintenance of a system of permanent and substantial improvements in aid of commerce and navigation in and for the harbor of such city or town wherein such tide-lands may be sold, and the remaining twenty-five (25) per cent shall be paid into the general tide-land fund of the state.

SEC. 2. Wherever harbor lines are now, or may hereafter be, located and established within or in front of any incorporated city or town in the State of Washington, the harbor line commission is hereby authorized and directed to approve and adopt, subject to the approval of the secretary of war, or an advisory board created by the secretary of war, as soon as may be practicable, such a system of harbor improvements, within the harbor line strip for each harbor wherein such lines may be located and established, as will

conform as nearly as practicable to any permanent improvements constructed or under construction therein as in their judgment, and upon the available advice of competent engineers, shall be best calculated to promote the permanent commercial welfare thereof; and all funds appropriated for the purposes of harbor improvements under the foregoing section of this act, or otherwise, shall be expended under the direction, supervision and control of the harbor line commission of the State of Washington, and the state auditor is hereby directed, upon the filing of vouchers approved by the harbor line commission, to draw warrants on the state treasurer, payable out of the several harbor improvement funds, and the state treasurer shall pay all said warrants out of said funds.

SECS. 3, 4: Irrelevant.

Approved March 10, 1891.

146 U.S. 646

FILED.
JAN 23 1892
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1364.

STATE OF WASHINGTON ON RELATION OF H. L. YESLER, PLAINTIFF IN ERROR,

vs.

WILLIAM F. PROSSER, EUGENE SEMPLE, FRANK H. RICHARDS, H. F. GARRETTSON, AND D. C. GUERNSEY, DEFENDANTS IN ERROR.

Motion to advance cause.

Now comes the above-named plaintiff in error, by Charles E. Shepard, Esq., and Burke, Shepard & Woods, Esqs., his attorneys and counsel, and come also the above-named defendants in error, by the attorney general of the State of Washington, and move this honorable Court to advance the above-entitled cause to a speedy hearing upon its merits.

The questions involved in this cause are as follows:

The above-named respondents are the harbor line commissioners of the State of Washington, duly appointed, qualified, and acting as such in pursuance of an act of the legislature of the State of Washington approved March 28, 1890

(Laws of Washington 1889–'90, p. 239), which act was passed by the legislature of this State pursuant to article 15 of the constitution of the State.

Respondents, as such harbor line commissioners, caused the harbor of the city of Seattle to be surveyed, determined upon the location of the harbor lines in said harbor, caused a plat to be made showing the location of such harbor lines, and were about to cause the same to be filed in pursuance of the constitution and laws of the State of Washington.

Whereupon relator procured a writ of prohibition to issue from the superior court of the State of Washington for the county of King prohibiting respondents from causing said plat to be filed for the reason that respondents had included within the harbor lines so located by them a portion of a wharf which had theretofore been erected by relator; and relator contends that the acts complained of amount to the taking of his property without due process of law.

From the order and judgment of the superior court overruling respondents' motion to quash the writ of prohibition an appeal was taken to the supreme court of the State, where such proceedings were had therein as that on the 15th day of July, 1891, the said supreme court of the State of Washington reversed the judgment of the court below and ordered the relator's writ of prohibition to be quashed.

See 27 Pac. Rep., p. 550.

From the decision and judgment of the supreme court of the State of Washington reversing the judgment of the superior court of King county the relator prosecuted his writ of error to the Supreme Court of the United States.

The parties hereto most respectfully urge the importance of an immediate hearing of this case for the following reasons:

First. A large number of other cases are now pending in the courts of the State of Washington involving the same

questions that are presented herein, and one or more cases are now pending in the United States circuit court for the State of Washington in which these respondents are enjoined from causing the plat heretofore referred to to be filed, or from doing any other act in relation thereto or in the performance of the duties enjoined upon them by law, and the litigation in such cases cannot be determined until a decision upon said questions is had from this Court.

Second. In the meantime an extensive plan of public improvements provided for by the constitution and laws of the State of Washington is suspended and the people of the entire State are deprived of the benefit of such public improvements.

Third. Private property amounting in value to many millions of dollars is involved in this litigation, and private and public enterprise within the harbors of the city of Seattle and other cities within the State is suspended by reason of the uncertainty consequent upon the fact that the questions herein litigated have not been settled by a decision from the court of last resort.

Fourth. By reason of the premises, this cause on error to the Supreme Court of the United States involves questions of great public importance and urgency, affecting, virtually, the rights of the State in respect to navigable waters and the rights of the owners of water-front property throughout the whole extent of Puget Sound and throughout the whole extent of all other tide waters within or bordering upon said State.

And counsel respectfully suggest to this honorable Court that it will be most agreeable to them to argue this cause before the Court, if advanced in accordance with this motion, on or about the first Monday of March, 1892; but if that day

cannot be assigned they desire that the Court advance the cause to such other early date as it may find convenient.

Dated January 14, 1892.

CHARLES E. SHEPARD,
BURKE, SHEPARD & WOODS,
Attorneys for Plaintiff in Error.
W. C. JONES,
Attorney General, for the State of Washington.

[Endorsed:] Case No. 14,838. Supreme Court U. S. 1891, October term. No. 1364. Henry L. Yesler, plaintiff in error, *vs.* The Board of Harbor Line Commissioners *et al.* Motion to advance.

[Stamped:] Office Supreme Court U. S. Filed Jan. 23, 1892. James H. McKenney, clerk.

cannot be assigned they desire that the Court advance the cause to such other early date as it may find convenient.

Dated January 14, 1892.

CHARLES E. SHEPARD,
BURKE, SHEPARD & WOODS,
Attorneys for Plaintiff in Error.
W. C. JONES,
Attorney General, for the State of Washington.

[Endorsed:] Case No. 14,838. Supreme Court U. S. 1891, October term. No. 1361. Henry L. Yesler, plaintiff in error, *vs.* The Board of Harbor Line Commissioners *et al.* Motion to advance.

[Stamped:] Office Supreme Court U. S. Filed Jan. 23, 1892. James H. McKenney, clerk.

146 U.S. 640

Office Supreme Court U. S.
FILED.
OCT 25 1892
JAMES H. McKENNEY,
CLERK.

CASE NO. 14,838.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892. NO. 912.

HENRY L. YESLER, PLAINTIFF IN ERROR,

v.

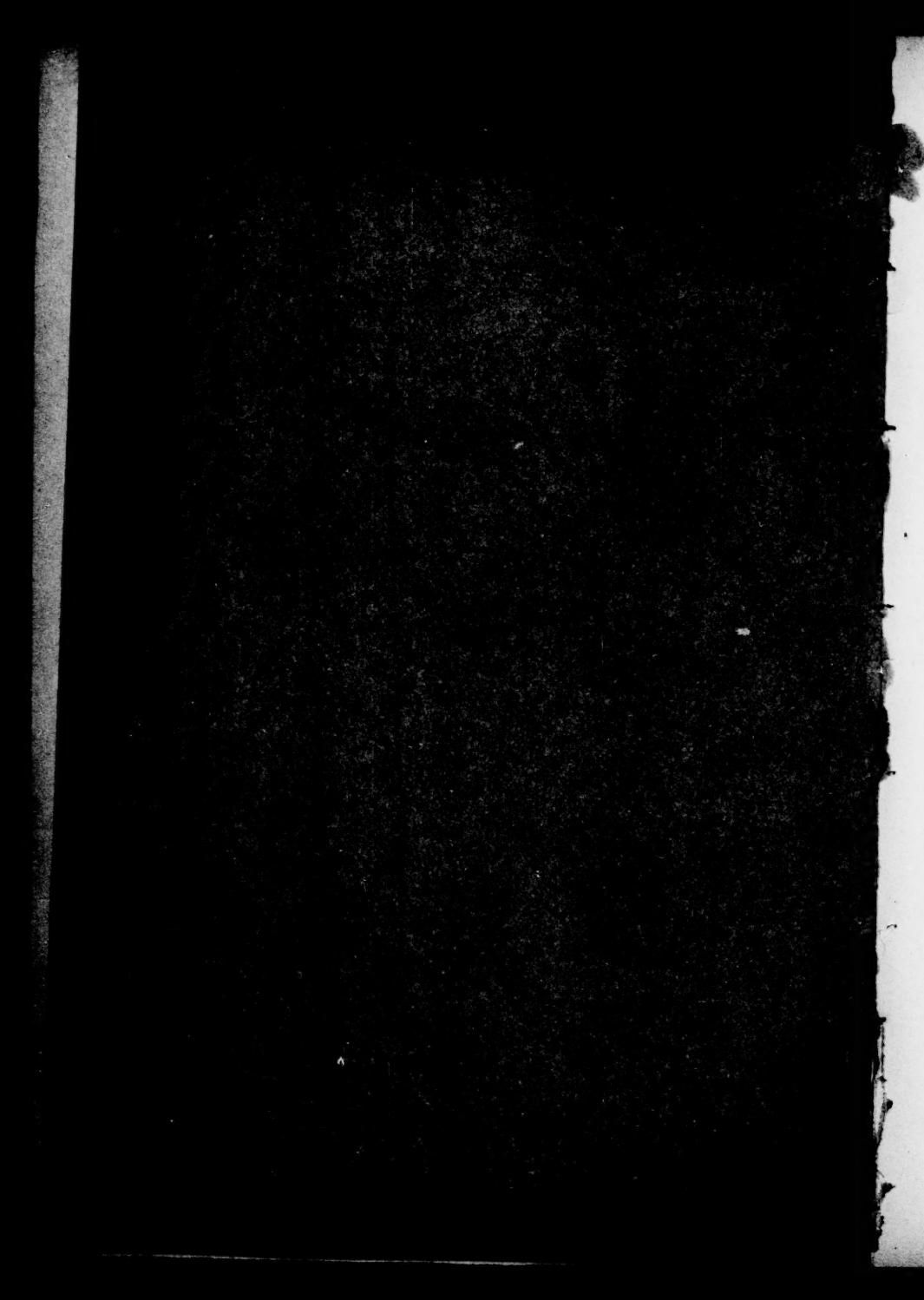
THE BOARD OF HARBOR LINE COMMISSIONERS ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

SUPPLEMENTAL AND REPLY BRIEF FOR THE PLAINTIFF IN ERROR.

THOMAS R. SHEPARD,
Of Counsel for Plaintiff in Error.

FILED OCTOBER 25, 1892.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892. NO. 912.

HENRY L. YESLER, PLAINTIFF IN ERROR,

v.

THE BOARD OF HARBOR LINE COMMISSIONERS ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

SUPPLEMENTAL AND REPLY BRIEF FOR THE PLAINTIFF IN ERROR.

Certain questions in this case call for a little further discussion by way of reply to some parts of the Attorney General's brief for defendants, as well as by way of supplement to the points made in our original brief.

I.

The Attorney General cites a number of State decisions which, he argues, deny the littoral proprietor's right of access. Nearly all of these will be found on examination to be beside that question except the New Jersey, Iowa, and West Virginia cases, which have been discussed in the plaintiff's original brief. From New York the defendants' counsel cites the Gould case as confidently as if its authority had not just been deliberately and completely repudiated by the court of appeals. The cases cited from the 10th Rhode Island, instead of bearing out what the Attorney General asserts that they hold, are direct and unqualified authority in favor of the right of access that this plaintiff claims, and their doctrine is so positively affirmed in the case of the Providence Steam Engine Company, in the 12th Rhode Island, that there can remain no doubt of the rule of the common law as expounded

by the courts of that State. Many of the other cases cited for defendants, as that from the 31st Maine, the Pennsylvania cases, and those from Wisconsin, do not grow out of a right of access claimed as incidental to a riparian estate, but involve merely the restriction of the general public right of navigation or of a granted right to make use of the waters by means of a dam or boom, or the like. The case cited from Mississippi is adverse to us in some of the reasons assigned for the decision, though not necessarily in the decision itself. The Willamette Bridge Company case, from Oregon (125 U. S. 1), instead of being a denial of the riparian owner's right of property in his access or his wharf, is simply a denial of original Federal jurisdiction in the absence of an act of Congress regulating the bridging of the stream. The case of Bowlby *v.* Shively, 30 Pac. Rep. 154, lately decided by the supreme court of Oregon, does, indeed, place that court in opposition to our claim of right; but inasmuch as that case is now in this court on writ of error and counsel for the riparian owner have been allowed by the court to file their brief in this cause as one involving like questions with their own, it would be "begging the question" to treat the Oregon decision as one of weight against us.

It is to be remarked, too, that while the case cited by the Attorney General from the 20th Maine, and, perhaps, other cases, do ignore or practically deny the riparian owner's right of property in his access to the contiguous waters, these are the older cases; and the doctrine of right of access to ways, like many another doctrine of the law, is one of modern development, not clearly apprehended, sometimes not considered at all, in the older authorities. It has been but gradually evolved and applied, as a logical outgrowth of the coexistence of the exclusive right of each individual to his estate in land and the common right of all individuals to the use of public ways by land and water, and as a necessary condition of the continued and vigorous existence of these rights side by side. None the less, it is a right resting on natural law and the common law, not one that must rest on concessions of state legislatures. The course of the New York court of appeals, beginning with land highways in the elevated railroad cases and culminating in the case of Rumsey *v.* New York &c. Ry. Co. (30 N. E. Rep. 654, decided in April, 1892, and not yet to be found in the official reports), involving the right of access to navigable and tidal water, with a frank abandonment of its false doctrine in the Gould case, marks the triumph of sound doctrine in

that State and is a notable index of the trend of later judicial decision on this subject.

Again, the older decisions disregarding the right of access will be found on examination to be a result of the generally received doctrine that the destruction or impairment of such an incidental right as this does not amount to a "taking" of property within the meaning of the usual constitutional guaranty of compensation in case of a taking for public use. New York, indeed, with no broader constitutional provision than this, now holds the deprivation of access to amount to a *taking*, calling for compensation; but the State of Washington, as has been stated in our principal brief, has by its constitution guaranteed to the citizen just compensation, in advance, for the *damaging* of his property for public use, as well as in case of an actual taking; and it is most significant that this constitutional provision has just been construed by the supreme court of the State of Washington, in the case of Brown *v.* City of Seattle, decided this month, to require compensation in advance for the damage to result from the execution by the city of an original grade established by ordinance prior to the plaintiff's purchase and improvement of her abutting property by the impairment of access from that property to the street. As this decision will not be published in the current reports for some weeks to come, we shall ask leave to file herewith a certified copy of the opinion for examination by this court. The supreme court of the State of Washington has decided at the same time, in the case of Parke *v.* City of Seattle, that in view of the constitutional provision referred to the city is now bound—as previously it was held not to be—to furnish the natural lateral support of the soil of its streets to the soil of abutting lots, or compensate the lot-owner for the damage consequent on the withdrawal of that support.

II.

Turning now to the territorial wharf acts, we desire to suggest to the Court that besides the force which in our principal brief we have already claimed for them,—that of vesting a private right of property in the wharves erected thereunder,—those statutes carry additional force, (1) as a Federal grant of a right of way for a quasi-public use, and (2) as a Federal regulation of commerce.

(1.) In legislating for the Territories "Congress exercises the combined powers of the General and of a State government." "Per-

haps the power of governing a Territory belonging to the United States, which has not by becoming a State acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

Am. Ins. Co. *v.* Canter, 1 Pet. 511, 542–3, 546 (per Marshall, C. J.).

To the same effect:

Benner *v.* Porter, 9 How. 235, 242.
Cross *v.* Harrison, 16 Id. 164, 194.

Having thus plenary powers of sovereignty over the Territories of the United States, Congress could have granted a right to wharf or any other easement in aid of the public interest over the shores of the territorial waters. To say that it could not, is both to fly in the face of accomplished facts of our history and to assume that the sovereignty of the General Government over its Territories is so emasculated that it cannot utilize the shores even for its own purposes, such as light-houses or forts, without exposing its improvements to forfeiture under the future State's claim of title to the site occupied. The denial of this power of Congress arises from the loose notion of holding "in trust for the future State," which has grown up purely from *obiter dicta*, beginning with some remarks found in Pollard *v.* Hagan. A little reflection will show that the phrase "in trust for the future State" confuses the relations and capacities of all concerned. The "future State" is to hold the beds of navigable waters by a sovereign title in trust for the protection of the public rights of navigation, etc. The State is itself a trustee, the collective unorganized public being the *cestuis que trust*. How, then, does the United States hold the title as trustee for the "future State," which is itself to hold as trustee? The true view, we submit, is that the United States, while a territorial government lasts, holds title to the beds of the navigable waters in trust for the same *cestuis que trust* for whom the future State in turn will hold that title in trust—for the collective public for the time being, in trust to preserve and promote their common right of navigation. Thus the organized State is not the beneficiary; it is the successor to the trust. But the "future

State," when created, becomes in this regard a trustee with uncontrolled discretion to manage and power to dispose, so far as concerns the rights of its *cestuis que trust*, the public—being limited only by its obligation to compensate for private property rights taken or damaged through its dealing with the subject of the trust. Then its predecessor in the trust, the United States, is a trustee with like unlimited powers; and its obligation toward the future State, the future *trustee*, is to transmit this incident of sovereignty to it unimpaired in quality, but not necessarily in quantity.

Congress was free, then, so far as the rights of the future State were concerned, to grant to a railroad company a right of way over public lands, shore or tide lands, or lands reserved as school lands for the future State.

Union Pacific R. Co. *v.* Douglass Co., 31 Fed. Rep. 540.

See also—

State *v.* Bachelder, 1 Wall. 109.
Wilkinson *v.* Northern Pacific R. Co., 6 Pac. Rep. 349 (Mont.).
St. Joseph &c. R. Co. *v.* Baldwin, 103 U. S. 426.
Decker *v.* B. & N. Y. R. Co., 30 Fed. Rep. 723.

But if Congress could itself do these things it could do them through the act of its agent, the Legislative Assembly of the Territory. In the government of the Territories Congress is not limited by any of the provisions of the Federal Constitution as to the form of government, or the distribution or delegation of its powers.

Am. Ins. Co. *v.* Canter, *supra*.

Now, we submit that the territorial wharf acts of 1854 and 1860, which thus emanated from a competent source, were *more* than mere donations to private parties of a right to wharf out over shore lands held by the United States in trust for the protection of the public right of navigation, and to be likewise held in trust by the "future State." These acts amounted to a grant of a right of way in aid of a public use. The wharfingers were not left free to admit to or exclude from their wharves when and whom they pleased. They were bound, if they availed themselves of the authority conferred, to land passengers and their baggage at all times free. Thus the wharves, while private property, were public agencies. Again, as

to freight, the wharfingers were bound under the statute to charge only *reasonable* rates. They were thus brought under regulation as common carriers. Their privileges were bestowed for the public as well as their private benefit, and the erection of a wharf was simply the making of a *practicable* right of way where a right of way had been granted by the statute as a matter of public as well as private concern.

(2.) The other aspect of these acts can be stated very briefly. If they proceeded from a competent source, as has been argued, they amounted, in fair intent, to a regulation of commerce. They were a regulation prescribed by a territorial legislature, to be sure, and not by Congress directly; but Congress not having disapproved the territorial statutes, under the settled doctrine it thus tacitly approved them and made them its own. As a regulation of commerce, then, if in no other view, these territorial wharf acts may well stand as an exercise by Congress of its constitutional power, paramount to and long antedating anything that the State of Washington can now do in the premises.

III.

We desire to call the court's attention to the "river and harbor act" of 1892 as indicating the intent of Congress, by the like act of 1890, to take control of all wharves and like improvements in all waters of the United States, and, by the act of 1892, to make that assumption of control more specific and unmistakable. Sections 7 and 12 of the act of 1890 are printed on page 8 of our principal brief. Section 3 of the act of 1892 (Acts 52d Congress, sess. 1, p. 110) amends section 7 of the act of 1890 by inserting, next before the clause "of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War" (which clause immediately precedes the proviso with which the section closes), the words, "of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater or," etc.

The change is significant as manifesting the will of Congress to exclude, henceforth, *all* interference of State authorities with *any* structure, or other instrumentality of navigation, in any navigable waters of the United States.

In support of the view that not only are wharves and docks essen-

tial facilities of commerce, such that Congress may and now does wholly regulate and control their location and use, but that their connection and common ownership with the riparian estate are essential to the prosperity of commerce, we beg leave, in conclusion, respectfully to refer the Court to the views of an eminent lay authority—the articles entitled "New York's Commercial Blight," by William Nelson Black, published in the June and July numbers (1892) of the Engineering Magazine.

THOMAS R. SHEPARD,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 6 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

146 US 646

No. 912.

HENRY L. YESLER

vs.

BOARD OF HARBOR LINE COMMISSIONERS.

BRIEF

ON

EXTENT OF WASHINGTON'S RIGHT OVER TIDE-LANDS WITHIN HER LIMITS.

Filed in No. 912 by leave of Court.

T. H. N. McPHERSON,
EDWIN B. SMITH,
Of Counsel for Jacob C. Mann,
Plaintiff in Error in No. 639.

T. H. N. McPHERSON,
No. 1234 F St. N. W.,
Washington, D. C.,
Attorney for Mann.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

No. 912.

HENRY L. YESLER

vs.

THE BOARD OF HARBOR LINE COMMISSIONERS ET ALS.

BRIEF UPON QUESTION OF THE EXTENT OF THE RIGHT OF WASHINGTON OVER TIDE-LANDS. (FILED BY LEAVE OF COURT.)

Statement.

By leave of Court, this brief is filed by counsel not representing Mr. Yesler, but another party, in a cause earlier entered upon your docket but not advanced (No. 639, Mann v. Tacoma Land Co.) in which discussion of the principal topic here mooted is sure to arise. Although that case (No. 639) presents additional facts, in some respects so different from those of the cause at bar that a decision adverse to the plaintiff in this would not overthrow Mr. Mann's title, yet a decision upholding Mr. Yesler's claim *as against the State of Washington*, must *ex necessitate rei*, vindicate Mr. Mann's.

If, in any event, the right can exist to locate upon tide-lands, or public lands between high and low water marks, a patent not *in his verbis* so locateable, but containing no restriction as to its location (except as to mining lands) then the title of our particular client will be found unimpeachable.

Our own case, then, is addressed mainly to the consideration of the question whether or not an unrestricted land-warrant can be located upon the public lands of the United States (not then within the limits of any State) which are subject to be bare or overflowed, according to the ebb and flow of the tide;—but this brief will be confined to this more general inquiry, common both to Mr. Yesler's and Mr. Mann's case, viz.;—

What, *if any*, rights (*other* than that of taking, if necessary, by right of eminent domain) did the State of Washington, by its admission to the Union, acquire over public lands not expressly granted to it by the enabling act? and what must be the relative subordination of any such right of the State (if any such right exist) as to persons who had previously acquired legal title, or possessory (or other) equitable claim, to any such public land, recognized either by the express legislation, or the practical administration, of the land laws and system of the United States? and how, if at all, are any such private titles or claims affected by the fact that the granted or claimed land lies between high and low water marks?

POINTS.

The question to be discussed is the nature of the original title of the United States to public land within what are now the territorial limits of Washington; how far, *if at all*, this title is qualified by the fact that the present subject of litigation is tide-land; and to what extent, *if at all*, the title is affected by the admission of Washington into the Union.

The legal definition of 'land' is "any soil or earth whatsoever; and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man" (Webst. Intern. Dict.); or, "Ground, considered as a subject of use or possession." (Cent. Dict.)

See all the Law Dictionaries, etc.
Mott v. Palmer, 1 N. Y. 572–3.

An individual may own any property of this description.

"Public land" is simply such property, the ownership of which is in the nation; held for the general benefit and common interest of the citizens of *that* nation which is the owner.

Property of this comprehensive and permanent description may be acquired and held, by nations as well as natural persons, by varying tenures; absolutely, or impressed with trusts of different origins, forms and characters.

For example;—our federal government acquired its public lands, partly by cession from the original States, upon certain terms; by negotiations with foreign nations, under treaty stipulations; and by the right of discovery, unrestricted and absolute.

These truths, because elementary, are stated at the outset in order to impress the observation (equally elementary) that every judicial decision, touching the title to our public lands, must be considered with reference to the manner of acquisition and nature of the tenure

of the title which was the subject of litigation and examination, in each particular instance.

I.

Nature of title.

The title of the United States to public lands in Washington originated in *discovery* of the country;—which title is absolute and unqualified.

It is an "original, fundamental principle, that discovery gave *exclusive* title to *those who made it.*" Johnson vs. McIntosh, 8 Wheat.*574.

Capt. Gray's discovery was made by him as a citizen of the United States, not of Massachusetts; in a vessel documented by, and flying the flag of, the United States. It *must* enure to the benefit of the whole nation, which maintained the title successfully, to the very verge of war; not to that of those who, under our national government, and owing it allegiance, settled upon some of these discovered lands, by permission of the United States; whether the local government over these settlers be territorial, or that of one of the states of the Union. *(Ib.)*

Martin v. Waddell, 16 Pet.*409.
Pomeroy, Const. L. 69, 70, 398.

"The lands of the United States, lying within the states, are held and subject to be sold as lands may be held and sold by individual owners, or by ordinary corporations."

U. S. v. Hughes, 11 Howd. 568.
Woodruff v. North, 18 F. R. 772.
Union v. Ferris, 2 Sawy. 179, 180.
Vansickle v. Haines, 7 Nev. 249.
Pomeroy Cons. L., 398, § 489.

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale *or other disposal* under general laws."
Newhall v. Sanger, 92 U. S. 763.

II.

Tide-lands.

The *title* of the United States to, or its rights in, land cannot be affected by the ebb and flow of the tide over it.

Its power of *disposition* cannot be changed thereby; —certainly, as to any such land as, at the time of disposal, lay within the limits of a territory; as was the case with that upon which Mr. Mann made his location; and, indeed, during the time in which Mr. Yesler's rights accrued.

Naturally, the title accruing by discovery must be to every portion of the land discovered, wet or dry, above water or under water, qualified by nothing except the discovering nation's own sense of obligation to regard the *actual* occupation of tracts by the aborigines; who hold even this much subject to the discoverer, and to his right of disposition in extinguishment of the aboriginal claim.

The United States acquired *everything* discovered, with all its possibilities of *any* use or improvement, *for itself;* not for some hypothetical, suppositional state, not yet conceived in the womb of the future. (8 Wheat., 574.)

The discoverer, or conqueror, in recognizing a vendible right in the aborigines, only places this amount of self-restraint upon himself; for it is merely a self-limitation to say that the aborigines will be allowed to

retain a salable interest but can sell to nobody but the discoverer.

It is as much an exercise of power (if not as extensive or injurious an exercise) to say no sale shall be made to anybody else as it would be to deprive the aborigines of it altogether.

As Judge CATRON (in his dissenting opinion in Pollard vs. Hagan) shows, there can be no valid distinction made, between high lands and low, the title to both having the same origin and extent. (3 How. *231–2 and *235, last sentence of Op.)

That the claim of the new states originally applied equally to upland and flowed land is indisputable. Mr. Webster states it to have been so maintained by the judge who delivered the majority opinion in Pollard vs. Hagan.

In his speech in the Senate January 14, 1839, after premising that he had given more attention to the public lands than other gentlemen from the East (invited thereto by Mr. Madison) and had sometimes differed from his party associates thereon, Mr. Webster observed:

"I heard doctrines and sentiments advanced which struck me *very strangely*. I recollect an able and elaborate argument by a member from Indiana, designed to prove that *all* the lands in any new State became the property of that state, by the mere fact of her admission into the Union. I heard a speech in favor of the same sentiment, by a member from Alabama, so distinguished for legal and constitutional attainments as since to have been made a judge of the Supreme Court of the United States [MCKINLEY]. These doctrines and opinions I have certainly opposed to the utmost of my power, as *having no foundation in constitutional law*, and as subversive of all justice and equity to the States. They did not obtain much favor with the country, and after a while appear to have been abandoned. (IV Webst. Wks. 523–4.)

In the next to the latest speech ever made by him in

the Senate, Mr. Webster, replying to the suggestion of Mr. Soulé that California, as a condition of admission as a State, should formally renounce any claim to the public lands within her borders, said:

"Let me remark that this question is not new here. I found it in the Senate the first session that I took my seat here. *There is a class of notions which run in a sort of periodical orbit.* They come back upon us once in fifteen or twenty years. The idea that the sovereignty of a State necessarily carries with it the ownership of the public lands within its limits was rife here twenty years ago. It was discussed, considered, debated, *exploded.* It went off, and here it is back again, with exactly the same aspect which attended it then."

V Webst. Wks., 390.

He then quotes the Indiana resolutions of 1828–9, which will be seen to base the right claimed upon an alleged reservation of it, for her benefit, in Virginia's "deed of cession." *(Ib.)*

He refers to Sen. Douglass of Illinois having shown "that, in the creation of a State, *its admission as a State has no effect at all on the property of the United States* lying within its limits." (*Id.* 395.)

Citing Pollard vs. Hagan, 3 How., *224,

"We therefore think the United States hold the public lands within the new states *by force of the deeds of cession,*" etc., etc.

Upon his circuit, June Term, 1852, McLean, J. said;—

"On the part of complainant, it was contended that, on the establishment of the state government, Michigan by virtue of her *sovereignty,* had a right to *all* the lands within her limits. This argument is not now advanced for the first time. Several years ago, it was broached in the Senate, and in some state legislatures, but it was received everywhere with less favor than its advocates anticipated. . . . . Looking at the matter as a

question of law, we have no hesitancy in saying the argument is groundless."

Turner v. Am. 5 McL. 346-7.

The decision in Pollard v. Hagan, *if intended to cover all the ground upon which the opinion bases it*, would sustain this claim, with regard to Alabama at least.

Judge McKinley's reasoning is that the territory out of which that state was carved was ceded to the United States in trust, and to be erected into States; that the federal right was measured and limited by the terms of this cession and trust, and terminated with the performance; that its claim to lands in Alabama rested upon that state's disclaimer of all " waste and unappropriated lands within the said territory "; and that the lands there in controversy were not within the language or meaning of this disclaimer. (3 How. 221 *et seq.*)

The extent of the trust was declared to be to convert the ceded lands into *money* and erect new states therefrom (p. *224); and that even an express stipulation for a federal right of eminent domain, over any of it, would have been void " because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere unless in the cases in which it is *expressly* granted." (p. *223.)

To the contrary of this, and that there are many powers that can be exercised as *implied* in the idea of national sovereignty (including the above-denied one of eminent domain) later cases, too numerous to cite, abundantly show.

Kohl v. U. S., 91 U. S. 367.
Legal Tender cases, 110 *Id.* 438.

Assuming Pollard v. Hagan to have been rightly determined, it must be so upon its main ground—of the limitations of the cession and trust—and not correct in the general tenor of the opinion; hence, to be confined to cases presenting a similar state of facts.

In Weber v. Commrs., 18 Wall., 65, 66, the California's right is based upon the terms of the act admitting her into the Union. And, without examination of the cases in detail, it may be observed generally, that the decisions, state and federal (down to Hoboken v. Pa. R. R. 124 U. S. 656) make the title to tide-lands depend upon the origination of the state within which they lie, and its relation to the federal government.

San Fr. v. Irwin, 28 F. R. 709; 136 U. S. 578.

In this particular, we shall see that the United States relinquished nothing to Washington, upon its admission, beyond the lands, in the enabling act, specifically mentioned. See Act Feb. 22, 1889, c. 180, § 4, item 'second' (25 U. S. 677); §§ 10 to 13 (*Id.* 679, 680); § 17, fifth and sixth paragraphs (*Id.* 681); § 18 (*Id.* 681–2).

These new states, provided for in this act, were excluded from the benefit of swamp land grants.

III.

Admission as a State.

The right and title of the United States is not displaced by the erection of this territory into a State. The *title* of the United States *as an owner*, with right of disposition, is not affected, even though the application for, and the granting of, admission may transfer such control over the *use* of the land as may prevent its being used to injure the public, and to facilitate its use for the common benefit.

This, indeed, applies to upland and shore. After

the State government becomes operative, it interferes to prevent a lot granted by the United States being employed to create or maintain a nuisance; and the origin of the title will not interfere at all with the application of the maxim, *Sic tuo utere, etc.*

Munn vs. Illinois, 94 U. S., 125.

"Nor does the *ownership* pass from the United States, and vest in a particular State, when the latter becomes organized as a separate commonwealth, throws off its territorial character, and is admitted as a State into the Union; but *the nation retains its property*, and from it must all private purchasers derive their rights."

Pomeroy, Const. L., 70 top.
Irvine vs. Marshall, 20 How. 558.

The sum and substance of it all is, that the *private ownership* of land is not disturbed *ipso facto* by any change in the form of government. If an individual owns land, upland or flowed, in a territory, he owns it in the State; if it belonged to the colony, it belongs to the State; if it was the property of the United States in the territory, it continues to be so in the State.

The *jus privatum* is undisturbed.

The *jus publicum* must, necessarily, be in that government, which is, *pro tempore*, the guardian and administrator of public rights and interests; but that simply means the power and duty of seeing that private property is not employed to the detriment of these general rights and interests.

So long as the territorial condition continues, the United States, which owns the land, is charged with the duty of seeing that neither it *nor any other property* is so used as to destroy public rights; and, further, with that of determining what is a proper and permissible use. When a State arises, it assumes this duty, and is charged with this obligation, subject to national supervision as to any act said to interfere with

commerce; but no change of title is thereby—*ipso facto*, and without special arrangement to that end—effected.

That which is necessary to the proper discharge of the functions newly assumed is transferred; — nothing more.

That the *title* passes, in the sense in which either nations or individuals convey lands to one another, is negatived in the case of Stockton v. Baltimore, 32 F. R., 9, where it was held that condemnation-proceedings were not necessary to take such land as the foundation of bridge-piers, and that *the State had not such property therein as entitled it to compensation* for the taking.

As the State's right to control the use of property, in the interests of its citizens, is consistent with the federal right "to regulate commerce" (Manchester v. Mass., 139 U. S., 262), so are both concurrently-existent with a right of private ownership by the nation, state, or individual.

IV.

Grants Prior to Admission.

The existence of rights in the several plaintiffs in error sufficient to maintain their respective claims as against the State of Washington would seem to be indisputable.

That is to say, *if* Mr. Mann made a valid location of his scrip—(and whether he did or not can only be argued in his own case; it will be assumed here;—as well as that Mr. Yesler acquired his right under federal laws)—before the admission of Washington, then his *title* cannot be divested by that admission.

Omitting, then, as properly debatable only in his own case (No. 639) all inquiry as to whether or not the United States, while only a territorial organization existed, *did* grant tide-lands to Mr. Mann, we now maintain the right to make such a grant to whomsoever it chose.

If we should concede the state to have that right now, it must have existed somewhere before the state existed; and it could then exist nowhere else than in the United States, which was both owner and ruler.

It cannot be that there is no power now competent to grant permission to build a wharf in Sitka; or that none existed, prior to 1889, that could authorize the erection of wharfs or the filling in of marshes at Tacoma and Seattle; which wharves or filled-lands would not be forfeited to the State, or be subject to unrecompensed destruction or injury by it, when created and admitted; and authority to build or fill, implies and includes the right to grant lands so situated as to be unfitted for any other beneficial or proprietary use.

The United States *must* have possessed such right *ex necessitate;* for the grant must precede the improvement.

This right has never been denied;—and it is all-sufficient to support Mr. Mann's claim.

Re-affirming the doctrine of Pollard vs. Hagan, this Court, by its Chief Justice, added;—

"UNDOUBTEDLY, *Congress might have granted this* [tide] *land* to the patentee · · · *before Alabama became a state.*"

Goodtitle v. Kibbe, 9 How. 478.
Irwin v. Marshall, 20 *Id.* 561-2.
Lansing v. Smith, 4 Wend. 21.
Gould v. Hudson, 6 N. Y. 536.

This has been very recently declared by the Supreme Court of Washington; though it prefers to rest the title of the grantee from the United States upon the

State's disclaimer, rather than the strength of the federal title.

Scurry vs. Jones, June 24, 1892;

and a still more recent decision, to same effect.

This right has always been exercised by the United States.

The statutes by which overflowed lands (which includes tide-lands; 5 Wall. 794) are donated rest upon this right. The power to give implies the right to withhold; or to give to whomsoever the donor pleases.

If innavigable in fact, though the tide covers and discovers them in its ebb and flow, there is no jurisdictional right infringed by a grant of them; and the fact of a grant is, at least, *prima facie* evidence of innavigability.

Wright vs. Roseberry, 121 U. S. 517.

Certainly, any one who claims a wharf upon such lands to be an infringement of public rights must prove it.

Dutton vs. Strong, 1 Black, 23.

Judge DEADY, while constrained to acquiesce in a doctrine he considers to be established by the decisions, (though unsound in principle) also perceives that it *can* only apply to lands not already granted by the United States; and says that, while tide-lands *undisposed of* by the United States passed to the State (Oregon) upon her admission, it was only a riparian proprietor whose estate abutted upon an *undisposed-of* shore that had the incidental rights of access, wharfing-out, etc. etc.

Case vs. Toftus, 39 Fed. R. 730.

It sums up thus:—The United States, as owner, while it was sole legislator too, and guardian of all public interests, could sell, or grant, or give tide-lands to whomsoever it chose, by an unimpeachable title; and its grantee could only be dispossessed of them, for a

public use, upon compensation made, as for other lands; whatever lands of this character remained undisposed of and *unreserved* passed to the state within whose limits they were upon its admission; its rights, however, were not proprietary, but only to control their use for a *public* purpose—the *jus publicum;* and, so far as necessary to preserve public rights, could control the use of that owned by a private citizen; subject itself to the commercial regulations of Congress.

These relations all harmonize. Congress controls within the constitutional sphere of its powers; the State looks after the public concern of its citizens in the use; and any private proprietor of such lands holds them only for such use as those governments permit.

T. H. N. McPherson,
Edwin B. Smith,
Of counsel for Jacob C. Mann,
Plaintiff in Error in No. 639.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1909.

HENRY L. TINKLER,

Plaintiff in Error,

vs.

THE BOARD OF HARBOR LINE COMMISSIONERS, N. F. [illegible], FRANK H. [illegible], and D. C. [illegible],

Defendants in Error.

BRIEF OF INTERVENOR, MILTON L. [illegible]

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IN THE

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Defendants in Error.

No. 912.

BRIEF OF INTERVENOR, MILTON L. BAER.

JOHN H. MITCHELL,
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of Counsel.

KOCH & OAKLEY PRINTING CO., SEATTLE.

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BRIEF OF INTERVENOR, MILTON L. BAER.

JOHN H. MITCHELL,
Attorney for Intervenor, M. L. Baer.
BERIAH BROWN, JR.,
of Counsel.

STATEMENT.

Article XVII of the Constitution of the State of Washington is as follows:

"Section 1. The State of Washington asserts its ownership in the beds and shores of all navigable waters in the State up to and including the line of ordinary high water where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the Courts of the State.

"Sec. 2. The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands patented by the United States. *Provided*, The same is not impeached for fraud."

Article XV of the Constitution of the State of Washington contains provisions for the appointment of a commission to locate and establish harbor lines in the navigable waters of all harbors, etc., wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof on either side, and also the following: "The State shall never give, sell or lease to any private person, corporation or association, any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as

the commission shall determine) be sold or granted by the State, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce."

Sec. 2 of the same article provides for the passage of general laws for the leasing of this reserved strip, for terms not longer than thirty years, with the right to build wharves and other structures, or that the State itself may build such wharves and other structures.

In pursuance of these Constitutional provisions the State did pass a statute for the appointment of a harbor line commission, and the defendants in error were duly appointed such commission. As such commission the defendants in error laid out a harbor line along the shore in front of the city of Seattle, and also along the front of a large body of tide flats, or mud flats, adjacent to and fronting on Elliott Bay, which flats are adjoining said city and a portion of which are within the corporate limits. The commissioners also, under the discretionary powers vested in them by the Constitution and the statute, created a reserved area, between the said harbor line and the line of ordinary high water, not only along the shore line but along the line of these mud flats, to the depth of 600 feet.

The intervenor here claims title under a selection made prior to the admission of the State, by virtue of a grant from the United States, of a tract of land on these mud flats, a portion of which tract is included within the reserved area as located by the commissioners. This intervenor has pending in this Court, brought here on writ of error from the Supreme Court of the State of Wash-

ington, an action against Moran Brothers Company, a corporation, brought to recover the possession of a portion of said tract, and has been permitted to file a brief herein.

BRIEF AND ARGUMENT.

We are not here contending that the State has not the power to establish a harbor line, beyond which no wharves or other structures may extend into navigable waters. This, we admit, is a legitimate exercise of the sovereign powers of the State. But we do contend that the claim of the State to a proprietary interest in lands on mud flats, not flowed by navigable waters and lying wholly within the harbor line, has no substantial basis in law as against a title claimed by virtue of a selection made pursuant to an act of Congress prior to the admission of the State into the Union.

It will be remembered that the claim of the State of Washington to a *proprietary* interest in these lands is not based on any grant of title thereto by Congress, for Section 17 of the Enabling Act (Vol. 25, Stat. at Large, p. 676) provides that the grants made therein were "in lieu of any claim or demand by said States, or either of them, under the act of September 20th, 1850, and Section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant, it is hereby declared, is not extended to the States provided for in this act, etc." And further: "That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided for in this act."

The whole claim of the State to title in these lands is based on the decision of this Court in the case of Pollard's Lessees vs. Hagan (3 Howard, p. 230), and other Alabama cases, and also some dicta from this Court in other cases, which is thought to lend color to the theory that a new State, on admission into the Union, takes a *proprietary* interest in all lands flowed by the tide within its borders by virtue of its sovereignty, and that the ownership of such tide lands by the United States during the territorial period is hampered by a trust in favor of the future State which would prevent their alienation. A proper examination of the case of Pollard vs. Hagan, *supra*, will show that the decision therein turned not on any implied trust, but on an *express trust created* by the very deeds of cession by which the United States acquired title to the public lands in the State of Alabama, and that this trust extended not only to the tide lands but to every foot of public land therein, whether high or low, wet or dry. We quote: "We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction or right of soil in and to the territory of which Alabama or any of the new States was formed, except for temporary purposes and to *execute the trusts created* by the acts of the Virginia and Georgia Legislatures and the deeds of cession executed by them to the United States, and the *trust created* by the treaty with the French republic of the 30th of April, 1803, ceding Louisiana."

Again, from the same decision:

"The object of all the parties to these contracts of cession was to convert the land into money, for the payment of the debt, and to erect new States over the territory

thus created; and *as soon as these purposes could be accomplished the power of the United States* over these lands as property was to cease. Whenever the United States shall have fully exercised these trusts, the municipal sovereignty of the new States will be complete throughout their borders, and they and the original States will be upon an equal footing in all respects whatever. We therefore think the United States hold the public lands within the new states by force of the deeds of cession, etc."

Again it will be noted in this case that while it is held that *all* the public lands in the state of Alabama were held by the United States *in trust*, it was admitted that the United States had the undoubted right to sell all of the high land, and nowhere denied or a denial even intimated that the United States could have sold or disposed of tide lands in that territory during the territorial period. In the later case of Goodtitle vs. Kibbe, 9 Howard, p. 471, this Court, with the same justices on the bench, corrected and modified Pollard vs. Hagan, while reaffirming the case, by this language: "Undoubtedly Congress might have granted this land to the patentee or confirmed his Spanish grant before Alabama became a state. But this was not done."

Thus modified, the law as laid down by the Supreme Court in the Alabama cases resolves itself into this: That all the land in Alabama was acquired by the United States in trust; that during the territorial period it was all, whether tide flats or high land, subject to disposition by Congress. That on admission Alabama, as successor to Georgia, became by virtue of sovereignty the owner of the shores and land under navigable waters not previously

disposed of by the United States, and that after the then existing national debt was extinguished Alabama would also, by virtue of her sovereignty, become the owner of all unsold public lands. This last proposition has not of late years been seriously contended for by Alabama or any other of the states created out of the territory ceded by the original thirteen states.

But what is the status of public lands in the state of Washington? Here the title of the United States is not based upon any deed or act of cession or treaty with any foreign nation. Its sole claim to the soil of the state of Washington is based on its original discovery and occupancy by the citizens of the United States. In the various contentions with other powers this has always been the claim of the executive power of our government.

Greenhow's Memoirs of the Northwest Coast of North America, Senate Executive document, 174, 26th Congress, 1st session, p. 185.

This claim of the political department of the government is binding on the Courts.

Foster & Elam vs. Nelson, 2 Peters, 253.

In all lands flowed by the tide the title is divisible into two distinct portions, the *jus privatum* or right of private property, which, when owned by the king, at common law, was the subject of full and unlimited transfer. (See Phear on Rights of Water, p. 41; also, Hall's Rights of the Crown and Privileges of the Subject in the Seashores of the Realm, 2d ed., p. 14). The other was the *jus publicum* or right of public use for purposes of navigation and fisheries: which, from its nature, was a trust vested in the king, and which, since the adoption of Magna

Charta, has not been the subject of disposition by the Crown. The former is a mere property right in the king, as the ultimate source of title to all real property in the kingdom. The latter an essential of sovereignty which cannot be parted with without impairing the sovereignty.

This distinction has not escaped the Courts. This Court, in construing a grant made by the legislature of New Jersey, in Hoboken vs. Pennsylvania Railroad Co., 124 U. S., p. 681, says:

"The defendants' act of incorporation would probably relieve the defendants after the work was executed, from the consequences of an unlawful encroachment on public lands in front of the streets, and of a nuisance in the obstruction of navigation, but it cannot affect the public easement of access to navigable waters which existed before the act was passed. That public right is entirely distinct, in its essential qualities, from the title of the State to lands under tide waters. The former *inheres in the State in its public capacity*. The latter is *strictly proprietary*."

The case at bar is not the first instance in which States, setting up a claim to what, at common law, was part of the *jura regalia* of the Crown, have failed to draw the distinction between those rights which are of a political character and those which are essentially proprietary. In California, on admission of that State into the Union, a claim was made that the State, by virtue of its sovereignty, acquired title to all the gold and silver mines in the State. The Supreme Court of the State (Hicks vs. Bell, 3 Cal., 219) so held, citing Pollard's Lessees vs. Hagan in support of the position that a new State, on admis-

sion, by virtue of its sovereignty, became entitled to the *jura regalia* which pertained to the king at common law. This decision became the rule of property in that State, and it was not until 1861 that the distinguished Chief Justice, now a member of this Court, exploded this fallacy and drew the distinction which we are endeavoring here to present, between regalian rights incident, and those necessary, to the Crown, holding that it is only to certain of the latter rights to which a State accedes by virtue of its sovereignty. We quote from the decision Moore vs. Smaw, etc., 17 Cal., 218, et seq :

"It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California, only in trust for the future State, and that such rights at once vested in the new State upon her admission into the Union. But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an independent State or Nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the power to declare war, to make treaties of peace, to levy taxes, to take private property for public uses—termed the right of eminent domain—are all rights of sovereignty, for they are rights essential to the existenee of supreme political authority. In this country this authority is vested in the people, and is exercised through the joint action of the Federal and State governments. To the Federal government is delegated the exercise of cer-

tain rights and powers of sovereignty, and, with respect to sovereignty, rights and powers are synonymous terms; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the people of the respective States, or vested by them in their local governments. When we say, therefore, that a State of the Union is sovereign, we only mean that she possesses supreme political authority, except as to those matters over which such authority is delegated to the Federal government, or prohibited to the States; in other words, that she possesses all the rights and powers essential to the existence of an independent political organization, except as they are withdrawn by the provisions of the Constitution of the United States. To the existence of this political authority of the State—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. Its minerals do not differ from the great mass of property, the ownership of which may be in the United States or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right: by the right of ownership, and not by the right of sovereignty.

"In Hicks vs. Bell the Court states correctly that according to the common law of England, mines of gold and silver were the exclusive property of the crown, and did not pass in a grant of the king under the general designation of lands or mines; but it assumes that this right of the crown—this regalian right—vested in the state. 'It is hardly necessary,' in the language of the opinion, 'at this

point of our history to make an argument to prove that the several states of the union, in virtue of their respective sovereignties, are entitled to the jura regalia which pertained to the king at common law.' It is in this assumption that the error of the decision consists. Under the general designation of jura regalia are comprehended not only those rights which pertain to the political character and authority of the king, but also those rights which are incidental to his regal dignity, and may be severed at his pleasure from the crown and vested in his subjects. It is only to certain rights of the first class that the states, by virtue of their respective sovereignties, are entitled. It is to the second class that the right to mines of gold and silver belong."

The parallel is apt and exact. The proprietary interest of the king in lands flowed by the tide is merely "incidental to his regal dignity and may be severed at his pleasure from the crown and vested in his subjects." The state's claim to a *proprietary* interest in lands flowed by the tides thus finds no basis in the analogies of the common law, in logical reasoning, or even in well-considered decisions, although we confess there is an abundance of dicta to that effect. But it is difficult and indeed impossible to imagine by what process of reasoning it could be made to appear that the sovereignty of the state can be impaired by the proprietary interest in these lands remaining in the United States, or its grantees, after admission, any more than by their passing into private ownership within a year or so thereafter. In the very Constitution in which the state asserts its ownership in tide lands, it makes provision for the sale of all except those outside of harbor lines, and a limited strip, reserved to be leased, not

that the sovereign control over them may not be lost, but that the state may receive a revenue therefrom. The questions are not political ones, involving constitutional rights, or the respective sovereignties of the state and nation. They are simply pecuniary as to whether the state or the nation shall pocket the proceeds of the sales of a very large and valuable class of public lands. Whether an obsolete fiction, which grew up in a stage of the development of the nation long since outgrown, which has no foundation in reason, law, or direct adjudication, shall be revived for the pecuniary benefit of a wealthy state, already the recipient of large bounties of public lands from Congress, granted with the express proviso, "That the states provided for in this act shall not be entitled to any further or other grants of lands for any purpose than as expressly provided in this act."

25 U. S. St. at Large, p. 676.

Whether a fundamental political heresy as to the respective rights of the State, National and Territorial governments, which at one time crept into and influenced the decisions of some even of our higher Courts, and which only went down in dust and blood after a protracted struggle, during which the very existence of the National government was jeopardized, should at this late day be revived and its reaffirmance demanded from the Courts for the sole purpose of despoiling the Federal government of its property interest in millions of dollars worth of public lands, to the end that the State of Washington and not the United States should profit by their sale. But it may be urged that it has become a rule of property that new States acquire title to tide lands by virtue of their

sovereignty and that Courts will not disturb settled rules. It may be observed here that if there is any such settled rule of property, it does not find its basis in any decisions of this Court, save and except in the Alabama cases, to which we have referred. In all other cases in which this Court has used language which might be construed as supporting that theory, the issues presented were between parties both claiming rights under the State, and in none of the cases, except from Alabama, has the State's capacity to make title been in issue. Further than this, in all the new States bordering on tide waters except Washington Congress has in express terms granted to them the right to all swamp and overflowed lands within their borders. This is in itself sufficient to convey to these States all lands flowed by the tides which are capable of private ownership. Where title can thus be based on direct grant from Congress, where is the necessity of an attempt to bolster it up by an obsolete fiction.

Mr. Justice Field, of this Court, while sitting as Circuit Judge in the case of San Francisco Savings Union vs. Irwin, 28 Federal Reporter, 709, held this in express terms. The contention was between the grantees of the State of California and the tenants of the United States, over a tract of land flowed by the tides, adjoining Mare Island, which had been purchased by the United States from the claimant under a Mexican grant. The Court held that the grant, being bounded in terms by "the water's edge," the title of the United States only extended to the ordinary high water mark, and that all the land lying below ordinary high water mark belonged to the State by virtue of the swamp land grant. We quote: "That testimony clearly showed that the land

was subject to periodical overflows by the rising of the tide in the Bay of San Pablo, so as to make it unfit to raise the ordinary crops of the country without protecting it by levees from such overflow. The act of 1850 grants swamp *and* overflowed lands. Swamp lands, as distinguished from overflowed lands, may be considered such as require drainage to fit them for cultivation. Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees and embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers and lakes, *or by the flow of the tides.*"

This decision has since been affirmed by this Court.

San Francisco Savings Union vs. Irwin, 136 U. S., 578.

Under this decision there can be no question that all lands flowed by the tides, which are capable of improvement and reclamation, passed to the several States by virtue of the act of Sept. 20, 1850, so that their status can never be jeopardized by any decision in this case. In the State of Washington there has been no rule of property established, none of this class of lands having as yet been sold by the State, although the United States has, during the territorial period, granted and patented thousands of acres to private individuals, as is recognized by the State in Article XVII, Sec. 2 of the Constitution. It is only to the status of these lands in the State of Washington that the decision here may of necessity apply.

But there is a view of the case to which all of the existing decisions on the subject of a State's title to tide

lands may readily be harmonized. This is, that the State, on admission, acquired, by virtue of its sovereignty, not the *proprietary interest in*, but the *jus publicum* over, all lands flowed by the tide. This is the essential element of sovereignty. This it was that the United States held in trust for the future State, and this it is that the State acquires by its sovereignty and holds in trust for its people.

Hoboken vs. Pennsylvania Railroad Co., Supra.

But when lands flowed by the tides become derelict by the receding of waters, by reclamation or by structures built thereon with the consent of the public, they cease to become subject to the *jus publicum*. Where there is no navigability possible in fact, there can be no public easement for that purpose. This was the view taken by the Supreme Court of California in the early case of Guy vs. Hermance, 5th Cal., 73-74, where it was held that if a mere trespasser went on a tract of tide land claimed by the State by virtue of sovereignty, and by filling in had reclaimed it so that it was no longer flowed by the tide, the title of the State fell, and its only remedy was to prosecute for a purpresture and compel a restoration of the tract to its former condition.

But is the tract of land claimed by intervenor, and in which the state is now asserting a proprietary interest, covered by any claim of right of public use? It is neither the shore of a navigable water, nor is it flowed by navigable water. It is a portion of a tract of land some 2000 acres in extent, with no specific designation known to the law, but generally classed in common parlance as tide flats or mud flats, and which are, strictly speaking, delta, composed of alluvial debris brought down from a river empty-

ing into the bay, and which are rapidly becoming derelict by the accumulation of this debris. They are identical in character with the lands referred to in Irwin vs. S. F. Savings Union, supra. Indeed, a very large portion of these lands are now no longer flowed daily, but only by the extreme monthly tides. They can by no possibility be used for purposes of navigation, but are barriers against it. "Navigability in fact, and not the ebb and flow of the tide," has in this country long been accepted as the true test of navigability in law, and by logical necessity it follows that as these lands are not flowed by waters navigable in fact, there can be no *jus publicum* over them.

The Genessee Chief vs. Fitzhugh, 12 How., 411,
United States vs. The Montello, 11 Wallace, 144.
Miller vs. Mayor, Etc., 109 U. S., 385.
Barney vs. Keokuk, 94 U. S., 324.
Angell on Tide Waters, p. 77.

Further than this, the Tide Land Commissioners of the State of Washington, a body constitutionally provided for and having full judicial powers to act to that extent at least, have laid out and located a harbor line between these flats and extreme deep water, beyond which no structures can be erected in the navigable waters. This results practically in a license to all owners of proprietary interests within that line to reclaim their land without fear of interference by the State, and is an abandonment by the State of any claim to the *jus publicum* within that line. Thus by reason and by law there can be no claim of title by the State to any lands so situated, except to the private proprietary interest. To such an interest, we think we have shown, the State cannot successfully assert a right.

There is, we confess, somewhat of a want of harmony between the various decisions on the subject of title to lands in tide waters, owing largely to the different legislation on the subject in the older States, and to the fact that few attempts have been made to draw a distinction between the various classes of lands, which are grouped together somewhat inartificially under the general title of tide lands. We think that included under that designation there are at least three distinct classes of lands, as follows:

First, land covered by tide waters navigable in fact. To this class of land the State takes title by virtue of its sovereignty as trustee for the public. Thus far we are with the defendants in error.

Second, the shore proper, where accretions are casual and caused solely by the influence of ocean and tidal currents, and where the owner of adjacent high land, in the exercise of his littoral rights, may properly be permitted to erect wharves, etc., under due State or National control, to prevent too serious encroachment on the navigable waters. Thus far we are in harmony with the contention of the plaintiffs in error.

Third, tide flats or mud flats, which in this State are composed of alluvial debris, brought down by rivers, and which almost uniformly are capable of reclamation by dyking, making farms of unsurpassed fertility. This class of lands properly fall within the designation of public lands of the United States, and are, either before or after statehood, subject to entry under either the general or special land laws of the United States. This is the contention of Intervenor Baer.

But leaving entirely to one side the question as to whether the State on admission took a proprietary interest in tide lands by virtue of sovereignty, there remains the fact that all Intervenor Baer's rights to the tract of land he claims were acquired from the United States prior to the admission of the State into the Union. The history of his title is as follows :

On April 5th, 1872, Congress passed an act granting to Thomas B. Valentine, or his assigns, the right to select a certain amount of the "unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws ; and if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys." This grant was made on conditions, all of which have been complied with. The most important condition was that Valentine should make a deed to the United States of a certain tract of land in California. This condition was complied with and scrip issued by the General Land Office in accordance with the terms of the act. One forty-acre piece of this scrip was subsequently assigned to Intervenor Baer, who selected at the United States land office at Seattle forty acres of the mud flats lying near the town, and filed his selection thereof, describing it by metes and bounds with reference to existing surveys, paid the land office fees required, and surrendered his scrip for cancellation. This location was made by Intervenor Baer on September 23, 1889, prior to the admission of the State of Washington into the Union.

The act of Congress under which intervenor claims was a legislative grant to Valentine of public lands, the selection of them being left to himself or his assigns.

Rutherford vs. Greene's Heirs, 2 Wheaton, 198.
Wallace vs. Parker, 6 Peters, 680.
Lessiers vs. Price, 12 Howard, 59.
Fremont vs. United States, 17 How., 525.

This act was not only a grant but a law, and has such force as the intent of the Legislature requires.

Schulenberg vs. Harriman, 21 Wallace, 62.
Langdean vs. Hanes, 2 Wallace, 331.
Washburn on Real Property, 5th Ed., Vol. 3 (*), p. 525.
Hornby vs. United States, 10 Wallace, 236.

The act was not only a grant and a law, but it, with its acceptance by Valentine, constituted a contract for a direct consideration issuing from Valentine to the United States, and to which the full faith of the United States was pledged. We contend that with this class of grant the rule of construction is the same as between private individuals. As stated by Mr. Justice Story: "The mere grant of a bounty by the king may properly be restricted to its obvious intent. But the contracts of the king for value are liberally expounded, that the dignity and justice of the government may never be jeoparded by petty evasions and technical subtleties." See also :

Washburne on Real Pr., Vol, 3, p. 524, 5th Ed.
Hymann vs. Reed, 13 Cal., 444, 452, et seq.
Commonwealth vs. Roxbury, 9 Gray (Mass.), 592.
Martin vs. Waddell, 16 Peters, 411.

On the compliance by Valentine with the terms of the granting act and the issuance of scrip to him, nothing

further remained in him or his assigns to do, except to surrender his scrip and make his selection, which, in the language of this Court in Lessieur vs. Price, *supra*, "gave precision to the grant and attached it to the land selected."

The selection of Baer as assignee of Valentine "passed the fee out of the United States and vested it in him as grantee. The scrip and the application became the instruments of title and conferred on him the legal title as effectually as could have been done by the issuance of the patent."

Larriviere vs. Madigan, 1 Dillon, 457.

The lands when selected were unoccupied, unappropriated and non-mineral. The only remaining question is whether they were public lands of the United States. We contend that all "the lands in the Territory of Washington, including the beds and shores of navigable waters below ordinary high tide or water, belonged, prior to the admission of the State into the Union, to the United States *as proprietor*, and was subject to its jurisdiction as sovereign."

Shiveley vs. Welch, 20 Federal Rep., 28-32.
Case vs. Toftus, 39 Federal, 733.
Irwin vs. Marshall, 20 Howard, 550.
United States vs. Gratiot, 14 Peters, 526.
Gibson vs. Chouteau, 13 Wallace, 92.
National Bank vs. County of Yankton, 101, U. S. 133.

That "as such sovereign and proprietor it may dis-

pote absolutely of all the public land in the Territory, whether *high or low, wet or dry.*"

Case vs. Toftus, Supra.
Goodtitle vs. Kibbe, 9 Howard, 471.
Teschemacher vs. Thompson, 18 Cal., 11.

But this is simply multiplying authorities in support of an elementary principle of law, which is that the right to acquire property carries with it necessarily the right of disposition. There can be no legitimate contention that the United States, during the Territorial period, did not have the absolute right to grant a proprietary interest in tide lands in the Territory of Washington.

This being true, would such lands come within the meaning of the grant to Valentine? Entitled as we are to have the grant liberally construed, our contention is that with the exceptions specifically set out in the granting act, any lands of which Congress had the right of disposition, passed to Valentine on his selection by them in satisfaction of his grant, and the Courts have no power to declare exceptions, other than those contained in the act itself. "Expressio Unius Est Exclusio Alterius."

Broome's Legal Maxims, 2d Am. Ed. * page 505.
Endlich on Interpretation of Statutes, 1st Ed., p. 397, and cases cited.

Thus our title was complete before the State was admitted into the Union, and the State has no right to assert a proprietary interest in these lands, save only in the

exercise of the right of eminent domain, after proceedings had for the purpose of condemnation, which is not the case at bar.

JOHN H. MITCHELL,
Attorney for Intervenor.
BERIAH BROWN, JR.,
Of Counsel.

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FILED.
OCT 29 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 912.

HENRY L. YESLER, PLAINTIFF IN ERROR,

vs.

THE BOARD OF HARBOR LINE COMMISSIONERS ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Opinion of the Supreme Court of the State of Washington in the Case of Eisenbach et al. v. Hatfield, and Dissenting Opinion of Stiles, J.

EISENBACH ET AL. *v.* HATFIELD.

(*Supreme Court of Washington, March* 12, 1891.)

RIPARIAN RIGHTS—TIDE LAND—WHARVES, DOCKS, ETC.—ACCRETION.

1. The title to land over which the tide ebbs and flows is in the State, and a riparian owner can claim no easement in it, nor impose any servitude upon it, without the consent of the legislature.

2. Under Const. Wash., art. 15, providing that the legislature shall provide for the appointment of a commission to establish harbor lines in the navigable waters of all harbors in the State, within or in front of the corporate limits of a city, or within a mile thereof, and shall provide for the leasing of the right to build and maintain wharves, docks, and other structures, a riparian proprietor on the shore of the sea, so situated, has no authority, as such, to extend wharves in front of his land below high-water mark.

3. Nor can the riparian proprietors' right to accretions, not yet in existence, give him any rights in the land below high-tide mark, as against the State.

4. A riparian proprietor cannot sue to enjoin the erection and maintenance of structures on tidal land by persons who erected the same, and were in use and possession for commerce, trade or business prior to the passage of act Wash. March 26, 1890, which provides (section 11) that the owners of any lands fronting on the Pacific ocean, or any bay, harbor, etc., shall have the right, for 60 days after final appraisement of tide lands, to purchase such as are in front of the lands owned by them: "Provided, that if valuable improvements, in actual use for commerce, trade or business have been made upon said tide lands, * * * the owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid."

Stiles, J., dissenting.

Appeal from superior court, Pierce county.

This is a suit for an injunction. After the complaint was filed, and a temporary order issued, plaintiff filed an amended complaint, which alleged, in substance, that he was the owner of certain upland bordering and abutting upon the high-water mark of Puget sound; that by reason of such ownership he was entitled to certain littoral rights in and to the shore opposite his lands, and that the appellants were occupying the shore opposite his land, and erecting structures and improvements thereon. Defendants filed an answer disclaiming any right or title to any land above high-water mark,

and alleging that the land occupied by them is part of the shore of Puget sound, and that valuable improvements, in actual use for commerce, trade, and business, had been made upon said lands long prior to the passage of the tide-lands act of March 26, 1890, and that said improvements were on March 26, 1890, and prior thereto, in actual use for commerce, trade, and business, and that the defendants are the owners of, and in possession of, such improvements; and alleging the purpose of the appellants to erect on said shore conveniences for shipping, and that the plaintiff would have the right in common with all other persons, and upon the same terms, to use such conveniences when erected, and denying that the plaintiff had been denied access from his land to the navigable waters of Puget sound for any purposes of commerce or navigation; and denying that the appellee has desired access or egress from the waters of Puget sound for any purpose of commerce or navigation; and alleging that the harbor lines have not been fixed opposite said lands, and that the lands have not been disposed of by the State of Washington; and denying that the appellants have wrongfully or unlawfully obstructed plaintiff's access to the navigable waters of Puget sound. To this answer plaintiff demurred, on the ground that the same did not state facts sufficient to constitute a cause of action, and this demurrer was sustained. Defendants declined to answer further, and a final decree of perpetual injunction was made.

Calkins & Shackelford, for appellants. Doolittle, Pritchard, Stevens & Crosscup, for appellee.

ANDERS, *C. J.*:

In this case this court is called upon for the first time to determine the rights of littoral proprietors of lands abutting upon the shore of an arm of the sea in which the tide ebbs and flows; and, while it is scarcely necessary to look beyond our own constitution and laws for authority to guide us to a conclusion, still, owing to the importance of the questions both to individuals and the public, and the magnitude of the interests involved, we have examined the numerous authorities cited by the learned counsel for the respective parties in the elaborate briefs which they have filed, in order that we might familiarize ourselves with the decisions of other courts upon the subject, and with the reasons upon which their decisions are based. We shall not attempt, however, to review all of the decisions in detail, for that would be impracticable, if it were desirable, but will only refer to a few of the cases especially alluded to by counsel.

In this State the common law is our rule of decision in the settlement of questions requiring judicial determination, when not specially provided for by statute. And it seems to be generally conceded that at common law the title to the soil under water was vested in the Crown. The ownership of the soil was regarded as a *jus privatum*, and could be conveyed to individuals, subject only to the public right of navigation and fishing, which public right was

under the absolute control of Parliament. In this country we have the highest authority in support of the doctrine that the State has succeeded to all the rights of both King and Parliament, and hence is the absolute owner of all navigable waters, and the soil under them, within its territorial limits.

This question was thoroughly discussed by the Supreme Court of the United States in the case of Martin *v.* Waddell, 16 Pet. 367. That was an action of ejectment for land under the waters of Raritan bay in New Jersey, over which the tide ebbed and flowed. The land in controversy was included in a large tract which was granted by the King of Great Britain to the Duke of York and subsequently became vested in the proprietors of East Jersey, who afterwards surrendered to the Crown all their governmental powers, but retained all their rights of private property. One of the parties to the action, as the grantee of the State of New Jersey, under a law of the State claimed the exclusive right to take oysters in the place granted, and the other claimed the same right by virtue of his title from the proprietors.. The right of the Crown to make the grant to the Duke of York, which not only included the tide land, and also the waters and soil under the waters, as well as the power of the State to convey the same, were questions thus brought directly before the court for determination ; and it was held that the King, as the representative of the nation, had an unquestionable right to make the grant to the Duke of York, with all the prerogatives and powers of government therein contained. In discussing the question as to whether, since *Magna Charta*, the King had power to grant land covered by navigable waters to an individual, so as to give him an exclusive right of fishing within the limits of the grant, Mr. Chief Justice Taney said : "And we the more willingly forbear to express an opinion on this subject because it has ceased to be of much interest in the United States; for when the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to the grants of the British Crown." The natural and logical conclusion of the court was that the grant by the State conferred upon its grantee the exclusive right to take oysters within the territory covered by the grant.

The question of the ownership of lands under the tide water was again raised in the same court in the case of Pollard's Lessee *v.* Hagan, 3 How. 212, which was ejectment for a lot of land in the city of Mobile, in Alabama, which lay below high-water mark, and which had been granted to plaintiff by Congress. After approving the decision in the case of Martin *v.* Waddell, Mr. Justice McKinley, in the course of his opinion says: "Then to Alabama belong the navigable waters, and the soil under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United

States; and no compact that might be made between her and the United States could diminish or enlarge those rights." The court further says that, "by the preceding course of reasoning, we have arrived at these general conclusions: First, the shores of navigable waters, and the soils under them, were not granted by the Constitution of the United States, but were reserved to the States, respectively; second, the new States have the same rights of sovereignty and jurisdiction over this subject as the original States; third, the right of the United States to public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the lands in controversy in this case."

Again in the case of Weber *v.* Commissioners, 18 Wall, 57, it was held that to the State of California, upon her admission into the Union, passed the absolute property in, and dominion over, all soils under tide water within her limits, with the consequent right to dispose of the title to any part thereof in such manner as the State might deem proper, subject to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations, and among the several States the regulation of which was vested in the General Government. Opinion of Mr. Justice Field, at page 65.

The court went still further in the case of McCready *v.* Virginia, 94 U. S. 391, and there held that not only the soil under tide waters in the State, but the waters themselves and the fish in the waters so far as they are capable of ownership belonged to the State, and that the legislature had the constitutional right to pass a law prohibiting any person, not a citizen of the State, from fishing in such waters. And in Willson *v.* Marsh Co., 2 Pet. 245, the court sustained an act of the legislature of Delaware authorizing the damming up of a navigable stream for the benefit of adjoining lands.

The case of Hoboken *v.* Railroad Co., 124 U. S. 656, 8 Sup. Ct. Rep. 643, was an action of ejectment for land occupied by the railroad company along the margin of the Hudson river. Plaintiff claimed by dedication of the street to the water by the original proprietor of the land, as evidenced by the "Loss" map. Defendant claimed by virtue of a grant from the State. Mr. Justice Matthews, speaking for the court said: "The nature of the title in the State to lands under tide water was thoroughly considered by the court of errors and appeals of New Jersey in the case of Stevens *v.* Railroad Co., 34 N. J. Law, 532. It was then declared (page 549) that all navigable waters within the territorial limits of the State, and the soil under such waters, belonged in actual propriety to the public; that the riparian owner, by common law, has no peculiar right in this public domain as incident of his estate; and that the privileges he possesses by the local custom, or by force of the wharf act, to acquire such right can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendant of that part of the property of the public which lies in

front of the lands of the plaintiff, and which is below high-water mark. It was therefore held in that case that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tide water, below the high-water mark, to be occupied, and used with structures and improvements in such a manner as to cut off the access of a riparian owner from his land to the water, and without making compensation to him for such loss." And again: "Our conclusion, therefore, is that the grants from the State of New Jersey, under which the defendant claims respectively, are a complete bar to the recovery sought against them in these suits." And finally: "Under those grants they have and hold the rightful and exclusive possession of the premises in controversy against the adverse claims of the plaintiff to any easement or right of way upon, and over them, by virtue of the original dedication of the streets to high-water mark on the Loss map."

The foregoing decisions of the highest judicial tribunal of the United States without other or further authority, would seem to settle, beyond controversy, the question of title to the tide lands of this State, and to leave no doubt whatever that they belong to the State in actual propriety, and that the State has full power to dispose of the same, subject to no restrictions, save those imposed upon the legislature by the constitution of the State and the Constitution of the United States; and if this be true, it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon the tide waters within the limits of the State, without the consent of the legislature.

But, in order that there might be no doubt upon this vexed question, the constitution of the State has spoken upon the subject. Section 1, art. 17, of that instrument, declares that "the State of Washington asserts its ownership to the beds and shores of all navigable waters in the State, up to and including the line of ordinary high tide, in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State." And so zealous were the people of the State in guarding their rights in these lands that they inserted a proviso in the constitution to the effect that no law of Washington Territory, granting shore or tide lands to any person, company, or any municipal or private corporation, should be deemed valid. Const., art. 17, § 2.

Appellee contends, however, that whatever may be the title of the State to the soil under tide water, he, by virtue of his contiguity to the water, has certain rights in the shore beyond those of the general public, and which are peculiar to himself, among which are a right to a wharf out opposite to his upland, a right of ferriage, a right of unobstructed access to the navigable water in front of him, and a further right to accretions that may hereafter be formed and that all of these rights are property, and are "vested rights." And in support of this contention the learned counsel for appellee

have cited many authorities, among which are Dutton *v.* Strong, 1 Black, 23; Railroad Co. *v.* Schurmeir, 7 Wall, 272; Yates *v.* Milwaukee, 10 Wall, 497.

But, before proceeding further, it may be proper here to observe that riparian rights in the several States are settled by the respective States for themselves. See St. Louis *v.* Myers, 113 U. S. 566, 5 Sup. Ct. Rep. 640; Barney *v.* Keokuk, 94 U. S. 324; Willson *v.* Marsh Co., 2 Pet. 245.

In Dutton *v.* Strong, cited by appellee as an authority in favor of his right to wharf out against his premises, the facts before the court were as follows: The defendant in the court below had constructed a landing or bridge pier in front of his premises, extending to the navigable waters of the lake. Plaintiff's vessel was moored to this pier in a storm, and, by force of the gale, was about to pull down and destroy defendant's structure, when he, after requesting the master of the vessel to detach the same, but who refused to do so, cut the hawser, whereby the ship was set adrift and sunk. Plaintiff sued for the resulting damage. The court held that the defendant had a right to erect a pier where it was, and to protect the same by cutting the vessel's fastenings, even although it was thereby exposed to destruction. Speaking of the origin of riparian rights in this country Mr. Justice Clifford said: "Our ancestors when they immigrated here undoubtedly brought the common law with them as a part of their inheritance; but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil, between high and low water, to the accomplishment of these objects. Different States adopted different regulations upon the subject, and in some the right of the riparian proprietor rests upon immemorial usage. No reason is perceived why the same general principle should not be applicable to the lakes, although these waters are not affected by the ebb and flow of the tide." We have no doubt of the correctness of that decision, and this court would undoubtedly follow it in a similar case.

The case of Railroad Co. *v.* Schurmeir involved the title to land on the Mississippi river at St. Paul. Schurmeir's premises were bounded by high-water mark of the river, but the land in front had been filled in and built upon, down to extreme low-water mark; and it was held that he had a right, as riparian proprietor, to the reclaimed land, as against the railroad company. And, at page 289, Mr. Justice Clifford said: "Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide." But it will be remembered that the same learned judge said in Dutton *v.* Strong that different States adopted different regulations upon the subject; and no doubt the decision of the case was in no way in conflict with the "regulations" of Minnesota.

The question before the court in Yates *v.* Milwaukee was as to the validity of an ordinance of the city of Milwaukee declaring a

wharf belonging to Yates a nuisance; and it was remarked by Mr. Justice Miller, in speaking generally of riparian rights on navigable streams, that, whether the title of such owner extended beyond the dry land or not, he has the right of access to the navigable part of the river, and to make a landing, wharf, or pier for his own use or that of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever they may be, and that it is a valuable right and property, and a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation.

But if the court in these cases really intended to say that the same rule applied to the shore of the sea, or the arms of the sea, and that a riparian proprietor has a right, as against the State, to erect wharves extending below high-water mark, we cannot see how these can be reconciled with other decisions of the court, especially with that of Hoboken *v.* Railroad Co., *supra.* But it would seem, however, that the court in the later case of Weber *v.* Commissioners did make a distinction between tidal and non-tidal waters; for in that case Mr. Justice Field, after approving the doctrine laid down in Yates *v.* Milwaukee, says: "Nor is it necessary to controvert the proposition that in several of the States, by general legislation or immemorial usage, the proprietor whose land is bounded by the shore of the sea, or of an arm of the sea, possesses a similar right to erect a wharf or pier in front of his land, extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those States where the common law obtains. By that law, the title to the shore of the sea, and of the arms of the sea, and under tide waters, is, in England, in the King; in this country, in the State. Any erection thereon, without license, is therefore deemed an encroachment upon the property of the sovereign, or as it is termed, in the language of the law, a 'purpresture,' which he may remove at pleasure, whether it tend to obstruct navigation or otherwise." We think the above is a correct statement of the law applicable to riparian rights on tide waters, and that it is fully supported by the authorities. Gould, Waters, §167, and cases cited; Com. *v.* Alger, 7 Cush. 53; Dana *v.* Wharf Co., 31 Cal. 118; Martin *v.* O'Brien, 34 Miss. 21. And in this connection it must not be forgotten that in the case of Dutton *v.* Strong, Railroad Co. *v.* Schurmeir, and Yates *v.* Milwaukee, as well as that of Case *v.* Toftus, 39 Fed. Rep. 730, also cited by counsel, the respective riparian proprietors had already erected their improvements, presumably with the license of the State, and therefore had vested rights of property which it was proper to recognize and protect. This seems to have been the view of Mr. Gould, for, in a note to section 149 of his work on Waters, in which he quotes from the opinion of the court in the case of Yates *v.* Milwaukee he uses this

language: "In this case the wharf which it was attempted to condemn as a nuisance was actually built."

In Ravenswood *v.* Flemings, 22 W. Va. 52, which is a well-considered case, it was held, under a law of that State, that a riparian proprietor on a navigable river had no right to build a wharf, ferry, or bulk-head below high-water mark, without the consent of the town council, and that he might be prevented from so doing by injunction. And in Com. *v.* Alger, *supra*, the court, in a most learned and elaborate opinion by Chief Justice Shaw, sustained an indictment against the defendant for extending a wharf beyond the harbor line in the city of Boston, on his own land; and, further, that the statute establishing harbor lines, and taking away the rights of proprietors of flats in the harbor beyond the lines, to build wharves thereon, even when they would be no injury to navigation, and providing for no compensation to such proprietor, was not unconstitutional, as taking private property for public uses without compensation.

We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the State or its grantees, to extend wharves in front of his land below high-water mark.

But, if this were not so, we would still be constrained to hold that appellee has no such rights; for the constitution of the State, which is the supreme law of the land, expressly declares that the legislature shall provide for the appointment of a commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors of the State, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof, upon either side; and further, that the legislature shall provide general laws for the leasing of the right to build wharves, docks, and other structures upon certain designated areas, or the legislature may provide by general laws, for the building and maintaining upon such area, wharves, docks, and other structures. Const., art. 15. Nor can the right to wharf out be claimed under the act of the territorial legislature authorizing bank owners to build wharves in front of their premises. That act was but a license, at most, and until availed of, was revocable, and the constitution and subsequent laws have abrogated the law.

But appellee claims that he has a vested right to future accretions to his land, and cites as authority to sustain his position the case of County of St. Clair *v.* Lovingston, 23 Wall. 46. And the court in that case does say that the riparian right of future accretions is a vested right. But we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence. It seems to us that the more reasonable doctrine is announced in the case of Taylor *v.* Underhill, 40 Cal. 471, in which case the court says: "The plaintiff, as a riparian owner, has also a right to accretions to his land, and it is said the claim of defendant will be a cloud upon his title to such accretions, but, as yet, there is no such property, and there may never be. He

cannot ask the court to interfere in advance to prevent a cloud being cast upon his title to that which may never have an existence."

The case of Railway Co. *v.* Renwick, 102 U. S. 180, cited by appellee was an action for damages by a riparian proprietor on account of the building of a railroad along the Mississippi river in front of his premises. The court held that the plaintiff could recover, but placed its decision upon a statute of Iowa (1874) providing for compensation to riparian owners in such cases. Previous to this statute it was held in the case of McManus *v.* Carmichael, 3 Iowa, 1, after an exhaustive review of the authorities, that the title of riparian owners extended only to high-water mark; and in the case of Tomlin *v.* Railroad Co., 32 Iowa, 109, the court held that "the doctrine deducible from adjudged cases is that, by the rules of the common law, the owner of land along the shore of a navigable river is entitled to no right, either in the shore or waters, as an incident of his ownership, except the contingent ones of alluvion and dereliction. Hence he is not entitled to damages for an improvement made along the banks of such river, by authority of the State, the effect of which is to deprive him of free access to the stream."

The same question was before the court of appeals of New York in the case of Gould *v.* Railroad Co., 6 N. Y. 522, and was decided the same way. In that case the court said: "The banks of the Hudson river, between high and low water mark, belong to the people, and the riparian proprietor has no better right to the use of it than any other person. If he build on it, or erect a wharf there, it would be a purpresture, which the legislature might direct to be removed, or to be seized for the use of the public; or the legislature might authorize an erection in front thereof, as in case of Smith's wharf on the Thames." And in Stevens *v.* Railroad Co., 34 N. J. Law 532, it was held that, although an owner of land adjacent to navigable water is more conveniently situated for the enjoyment of the public easement than others, he has, by virtue of common law, no more or greater rights than the rest of the community. In Langdon *v.* Mayor, 93 N. Y. 155, it was said that the legislature of the State, where not restrained by constitutional inhibitions, could authorize a boom to be placed across the Hudson river for private use, and that the right of the State to grant the navigable waters, except as restrained by constitutional checks, is as absolute as its rights to grant the dry land which it owns, and that the State holds the public domain as absolute owner, and not as a trustee, except as it is organized and possesses all its powers and property for the public benefit. See, also, Wood, Nuis. (2d ed.) 538, and notes.

Many decisions of the various State courts have been cited by appellee as sustaining a contrary doctrine to that of the above cases, but we find, upon examination, that they are mostly (especially those referring to riparian rights in tide waters) based either upon statutes or local customs, and are therefore not precedents binding upon us. Our attention is also called to the English cases of Buccleuch *v.*

Board of Works, L. R. 5 H. L. 418, and Lyon *v.* Fishmongers' Co., 17 Moak, Eng. R. 51, only the latter of which, however, we have had an opportunity to examine; and in that case the principal question involved was the construction of an act of Parliament which distinctly recognized riparian rights in the owner, and which provided (section 179) that "none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption or immunity, to which any owner or occupier of any lands, tenements or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this act had never been made." The statute is a very broad and comprehensive one; and, as it was not questioned but that Lyon's wharf was erected and used where it was in accordance with the law, the owner was entitled to the "privilege" of continuing to use it, as against the Fishmongers' Company, "as if the act had never been made." Indeed, it was conceded in argument that he had a right of access from the river to the front of his wharf, but it was contended that he had no such right as to the side next Winckworth's hole, which was merely an inlet from the river. The court held otherwise; and its conclusion was evidently in accordance with the provisions of the act in question, although at variance with the earlier common-law doctrine, as laid down by Lord Mansfield in Rex *v.* Smith, 2 Doug. 442, in which that eminent jurist held that the King might authorize the erection of a structure in front of defendant's premises between high and low water mark, in the River Thames, even though the defendant was thereby cut off from the use of his wharf.

The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the State to deal with its own property as it may deem best for the public good. If the State cannot exercise its constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess, a proposition to which we cannot assent. See Galveston *v.* Menard, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the State, but, on the contrary, we believe it is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the State or its grantees of wharves, upon shores of navigable waters, would constitute either a taking or damaging of private property for public use, in contemplation of the constitution. See Com. *v.* Alger, *supra.*

The next question to be considered is, by what right, if any, do appellants occupy the shore in front of appellee's premises? And in considering this question it must be remembered that the de-

murrer in this case admits that they have thereon valuable improvements in actual use for commerce, trade and business, and that said improvements were on said lands on March 26, 1890, the date of the passage of the tide-land act; that said lands are within one mile of the corporate limits of the city of Tacoma; that the harbor lines have not been fixed opposite to said lands; and that the same have not been disposed of by the State. Appellee has never erected any improvements on the shore, but claims that the appellants are trespassers, and that, as against them, he is entitled to relief by injunction. On the other hand, appellants claim to be rightfully in possession of the disputed lands by authority of the act of the legislature above mentioned. Section 11 of this act provides that "the owner or owners of any lands abutting or fronting upon, or bounded by, the shore of the Pacific ocean, or of any bay, harbor, sound, inlet, lake or water-course, shall have the right for sixty (60) days following the filing of the final appraisal of the tide lands to purchase all or any part of the tide lands in front of the lands so owned; provided, that if valuable improvements, in actual use for commerce, trade, or business have been made upon said tide lands, by any person, association, or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid: * * * provided, that nothing in this act shall be so construed as to apply to any improvements made after the passage of this act." We think by a fair construction of this statute, that appellants are rightfully in possession of the disputed premises, and have a right to maintain their improvements as they were on March 26, 1890, but that they have no right to enlarge their erections prior to such time as they may be authorized to purchase the lands from the State. For the foregoing reasons the judgment of the court below is reversed and the cause remanded for further proceedings in accordance with this opinion. So ordered.

Hoyt, Scott, and Dunbar, JJ., concur.

STILES, *J.* (dissenting):

The plaintiff in the superior court, the appellee here, alleged ownership of lots 15, 16, and 17 in blocks 1 and 2 in Wallace's addition to the city of Tacoma; that his lots had a water frontage on Puget sound, a navigable arm of the sea, for a distance of more than 150 feet; that defendants had, about May 1, 1890, taken exclusive possession of the shore in front of his lots, including all the area between high and low water marks, and had placed certain obstructions in the way of his access to the water, and were threatening to increase the obstructions, and refused him any access to the water from his land, or to permit him to enjoy any of his riparian rights. The prayer of the complaint was for a mandatory injunction to secure the removal of the obstructions. The answer admitted plaintiff's ownership to high-water mark, but denied his right of access and all other riparian rights; admitted taking possession of the shore; claimed improvements in actual use for commerce, trade, and business on March 26, 1890, and prior thereto, and the

right to purchase the land improved under the act of that date; and alleged the distance between high and low water marks to be not exceeding 250 feet, and from high water to water of the depth of 5 fathoms to be 400 feet. The court below sustained a demurrer to the answer, and the opinion of this court has reversed the ruling.

I think the demurrer should have been sustained—first, for the reason that the allegations of the answer, intended to show improvements March 26, 1890, were not the statements of any fact but conclusions of law; and secondly, on the main question, because the law of the case is different from that announced by the court in its decision. This is the first instance in the recorded history of English or American law where private persons, for private ends, have been sustained by a court in taking and maintaining permanent possession of the shore of an arm of the sea, or of any navigable water to the exclusion of the owner of the bank from passing over it to the water; and if the act of March 26, 1890, has the effect ascribed to it, it is the first act of an English or American legislature, not excepting those of New York and New Jersey, which has ever done so much. The public right in navigable waters, and to the soils underlying them, have been freely regulated and disposed of by both Parliament and the legislatures; but both have held sacred the rights admitted to exist in connection with the lands bordering the waters, whether with or without constitutional rules against taking private property without compensation. These rights have been regulated in divers ways proper to their locality, according to the complicated necessities of crowded harbors or the unfrequented shores of remote waters; but while it is true that a few courts have theoretically denied, many have actually upheld them, and no other legislature has ever ignored them. Even the act of the legislature of New York, in 1840, which gave rise to the case of Gould *v.* Railroad Co., 6 N. Y. 548, made the most ample provision for drawbridges, so as to continue navigation in bays and streams cut off by the railroads and for the extension of wharves and docks across the tracks to the river beyond; all of which was in obedience to the settled policy of the State inaugurated in 1786, which prohibited the sale of any shore lands to other than riparian owners. Rumsey *v.* Railroad Co., 114 N. Y. 423, 21 N. E. Rep. 1066. Of the other old States, every one, from the Massachusetts Colony, in 1641, down to New Jersey, in 1848 and 1869, has similar provisions to those of New York, and a similar policy. Of the younger States, while some have no provisions by statute on the subject, every one which has a statute yields to the shore-owner the right to wharf, and in the great majority of the others the courts have held such a right to exist whenever the question has been presented. I know this argument proves nothing in the face of the claim that it is for every State to settle for itself, through its legislature, what its policy in this regard will be. I adduce it merely by way of offering a reason why this court should be slow to conclude that the effect of the act of 1890, was, and was intended to be, what it has now been decided to be.

We are not a new people. As an organized community we date from 1853. True, the sovereignty was withheld until 1889; but, upon the faith of a policy adopted and placed among the statutes of the Territory in 1854, lands were acquired upon the shores of our navigable waters, and improvements made at great cost by private persons,—improvements which had a large share in making it possible for Washington to become a State, but which the principle of the court's decision would render it possible for the very next legislature to sweep out of existence or confiscate without compensation. This was a territorial statute, it is true; but the Territory was competent to frame and did frame policies in a hundred other particulars between which and this I can see no distinction. If Massachusetts, in 1641, when a mere colony of Great Britain, could absolutely grant away the soil beneath the waters, so as to bind her when she became a State, as well as the States of Maine and New Hampshire; and if the provincial governor of New York could, in 1689, grant to the city of New York the fee of the shore between high and low water marks, whereon are now based some of the most valuable titles in that city and in the world,—it would seem to be no great violation of common sense to say that the Territory of Washington could lawfully legislate to the extent of the act of 1854. And who has ever questioned the title to shore lands under the Massachusetts ordinance, or under the Dongan charter of 1689?

But it is said that the Constitution, or the act of 1890, or both together, have repealed the act of 1854. Let us see. In the schedule of the Constitution, (article 27, § 2,) in obedience to the last clause of section 24 of the enabling act, it was provided that all laws in force in the Territory, not repugnant to the Constitution, should remain in force until they expired by limitation or were repealed by the legislature; and then there was a proviso "that this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company, or any municipal or private corporation." What effect does that proviso have on any such act? It prevents the constitution from "validating" it. If the act was a valid law, it continued so; if it was invalid, it continued the same. Everybody knows that the proviso was aimed at a single case where the legislature of the Territory did once attempt to grant shore lands to a railroad company; and it was merely to prevent that act from gathering force from the constitution, so as to render that valid which it was suspected had become or had always been invalid, that the proviso was enacted. The grant was believed to have been a fraud, and dead in law, and the proviso was to prevent its being galvanized into life. But the act of 1854 (Code, § 3271) was not a grant of lands in any sense. This court has said it was "but a license, at most;" and while I do not agree that the right to wharf out was dependent upon the act, the court's statement is good law, to the effect that it was not a grant of tide or shore lands, and therefore was not covered by the proviso in question. But mark the differ-

ence when the Constitution touches shore lands covered by patents of the United States, taken and paid for in good faith by settlers. Article 17 treats of tide lands and in its second section the State expressly disclaims all title to such patented lands, unless the United States shall set aside the patents as fraudulent. Now, under the case of Pollard's Lessee *v.* Hagan, 3 How. 229, these patents so far as the tide lands were concerned, were absolutely void, and the lands would have belonged to the State, but for the constitutional waiver made by the people of the State in their high sense of fairness and justice.

The only other provision on the subject in the Constitution is in section 1 of article 17, where the State's ownership of the beds and shores of all the navigable waters in the State to ordinary high-water mark is asserted. But it did not require any such assertion to vest those lands in the State; for by an unbroken line of decisions, from far back of Pollard's Lessee *v.* Hagan, the courts have held that this ownership is in the State, thrust upon it as sovereign, in trust for its own people and those of the nation, for purposes of commerce and navigation as natural highways. It is idle to say that this assertion in the Constitution conferred or strengthened the actual title of the State, and this could not, therefore, have been its purpose. But there was a valid purpose to subserve by this assertion, and that was to put it beyond question that in this State the sovereignty assumed was to high-water mark, and not merely to low-water mark. The United States, in all its grants, has conceded that the fast land stops at high-water mark; but in some of the States as Massachusetts, Rhode Island, Illinois and Minnesota, the title of the shore-owner has been conceded to extend to low water, or a certain distance below high-water mark. This concession was by legislation in some States, and by the decisions of courts in others. Meyers *v.* St. Louis, 8 Mo. App. 266. I hold that it was to place Washington in the rank of the greater number of States which stop the title of the shore-owner at high water that the constitutional assertion of ownership was made, and for no other purpose, since no other purpose could be subserved by it. But mark, again, the care with which this assertion of ownership was coupled with the proviso "that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State." Under the view the court takes of these constitutional provisions, what vested right could there be to which the proviso would apply? It could not have reference to any wharf property erected under the act of 1854, since the court says that act was a mere license; and a mere license is revocable at the pleasure of the licensor, and creates no vested right. Kivett *v.* McKeithan, 90 N. C. 106; Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. Rep. 149; St. Louis Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384; Cobb *v.* Fisher, 121 Mass. 169. So the court holds that the right to future accretions is not a vested right, citing Taylor *v.* Underhill, 40 Cal. 471, although that was merely the refusal of the court to declare a void certificate of purchase from the State a cloud upon plaintiff's right. This leaves

nothing whatever for the constitutional provision to act upon, and the language under the court's interpretation is mere sound without any substance whatever.

The article (15) on harbors and tide waters is nothing more than a limitation upon the legislature prohibiting it forever from disposing of the sea or river beds beyond certain lines in front of incorporated towns. Such lines exist in all important harbors and are drawn to preserve the public right of navigation. Usually their location is changed from time to time as circumstances require, and it was a change of this kind, fully authorized by the State, that produced the case of Yates *v.* Milwaukee, 10 Wall. 497. The court seems to construe section 2 of this article as though there were never to be any wharves here except "upon certain designated areas," and that construction is quite harmonious with the views taken of the constitutional scheme as a whole; but, if anything else were necessary to convince one that the whole construction is wrong, this would supply it. Certainly no equally absurd scheme could be contrived, unless some one were to propose that, until the State builds its wharves, all ships must be anchored at the harbor line,—cargo and passengers to get ashore as best they can.

Turning now to the act of March 26, 1890, the first thing that attracts attention, as having a bearing on the matter under discussion, is that, for some reason, the law gives the pre-emptive right to buy tide lands, with certain exceptions, not to the public at large but to the upland owner; and therein, I maintain, is fashioned the general policy of the State on this subject, which is to enlarge the right conceded to be in upland owners by the act of 1854, and is exactly in harmony with the legislation of every other State in the Union which has lands of this character and laws upon the subject. I say this is the policy, because it is not going outside of proper bounds to further say that, of all the shores of navigable waters within the State of Washington, not one ten-thousandth part will be free from this pre-emptive right of shore-owners or their grantees, under section 12 of the act. This section 12 has some striking language in it, which, to my mind, further shows the policy. Under it, when an abutting owner has attempted to convey tide lands in front of his uplands, or littoral rights therein, his grantee may purchase the tide lands to the extent of the tract or rights (littoral rights) so conveyed. Now what are the "littoral rights" which the upland owner could so convey? Are they what the Constitution speaks of as "vested" rights? The mere license under the act of 1854 was not one of them because a license is personal to the licensee and cannot be conveyed. 13 Amer. and Eng. Enc. Law, 545. What "littoral" right could an upland owner attempt to convey, but his right to wharf out by way of severance? I confess inability to imagine any other; and if there is no other, and this one has no existence, then the statute has nothing to act upon. But suppose it was the wharf license that was meant, section 12 says nothing about an executed license as the one to be confirmed; and if this be the littoral right intended, then the legislature did not look upon

the act of 1854 as repealed by the constitution. Furthermore, it is hard to see what good the State's deed to the shore-owner's grantee will do for him, whether the littoral right be natural or statutory, if the harbor-line area is to be a wall between him and deep water. The State would be driving a hard bargain, indeed, with any such plan of operations, and is not to be suspected of such a scheme. But the most important thing about this section 12 is the legislative admission contained in it that the "land" and the "littoral right" are two so distinct and severable things that they may absolutely belong to different persons by deeds from the State. This is exactly what the doctrine of riparian access and wharfage is, and the justice of the provision made is apparent.

Lastly, touching the proviso of the eleventh section: "That if valuable improvements in actual use for commerce, trade or business, have been made upon said tide lands by any person, association, or corporation, the owner or owners of such improvements, shall have the exclusive right to purchase the land so improved; provided, that nothing in this act shall be so construed (as) to apply to any improvements made after the passage of this act." Here, again, the care of the legislature to preserve the right of the upland owner to acquire these lands is manifested most broadly; for subsequent to the passage of the act no enlargement of the improvements can be made, and the court in its decision so holds. And it is also to be noted that, whereas, the upland owner may acquire all of the tide lands in front of his upland, the improver has the pre-emptive right to nothing but the "land so improved;" so that in this case the appellants' purchase would be limited to the exterior line of their actual works on the 26th day of March, 1890, and the appellee could acquire all in front of them to the harbor line. Now, it was settled in Weber *v.* Commissioners that a purchaser of tide lands from the State was entitled to none of the rights of a riparian owner. 18 Wall. 57. Upon what consideration, then, was this pre-emptive right conferred upon "improvers"? The act itself furnishes the answer. By section 12, where the upland owner has, by his deed, for a consideration, conveyed his rights away, his grantee will be protected; yet there may be another class who have merit equally as strong as the grantee under a deed. Where the owner of the fee of land has stood by for years, while an adverse claimant under color of title has made valuable improvements, the improvements offset the damages for withholding, *pro tanto*, (Code, § 541;) and, if the inaction of the owner continues beyond the term of our statute of limitations, the very title is presumed to have passed to the adverse party. An easement, however, of the nature of which the upland owner's rights, both by nature and by statute, largely partake, is much more easily lost. It is lost if the holder of the right does, or permits to be done, any act inconsistent with the future enjoyment of the right. 6 Amer. & Eng. Enc. Law, 147. Therefore if an upland owner has, in any case, remained passive, while another has in good faith placed erections in the waters in front of him, which have not been abandoned, but are in customary use, the equitable policy of section 12 requires that

In Bank of Fort Madison *v.* Allen, 129 U. S., 372, it was held that:

"The doctrine that the distribution of a trust fund of a corporation to the individual stockholders upon their resolution does not deprive a creditor, not consenting thereto, of his right to compel the application of the fund to the payment of the debts of the corporation, cannot be invoked by a creditor who is a stockholder consenting to the distribution and participating in the appropriation."

The trust fund doctrine was not intended to apply to a creditor in Wood's position.

It does not appear who the other creditors are, nor does it appear what sums have been realized by the assignee and paid to creditors. It is submitted that in any event only those creditors who were not directly or indirectly parties to the breach of the contract between the corporation and the defendant can make any equitable claim against him, and that if it is necessary for the stockholders to make good any deficiency in assets to satisfy the claims of such creditors, he should at least be treated as well as the other stockholders by whose breach of contract he was prevented from obtaining his certificate and disposing of it at the time the company's business was profitable. We insist that no recovery can be had from the defendant except in an action in equity in which all the parties are brought before the Court, a full disclosure is made of the corporate assets and liabilities, and any liability for a deficiency in assets is properly proportioned in accordance with the principles of equity.

Point Third.

The assignment was invalid. It was made by the president pursuant to a resolution of the Board of Directors and he did not follow the instructions, conditions and authority contained in the resolution.

I.

The president was a special agent, and was bound in all his acts by charter, by-laws or authority given by Board of Directors or usage proved.

"Officers of a corporation are special and not general "agents; consequently they have no power to bind the "corporation except within the limits prescribed by the "charter and by-laws."

Adriance v. *Roome, 52 Barb., 411.*

President not *ex-officio* to sell property.

Crump v. *U. S. Mining Co., 7 Gratt., 352.*

"All persons dealing with the officers or agents of cor- "porations are bound to know, that they act either under "its charter or by-laws or the usages which may be shown "to exist, defining the extent of the authority."

Daniels, J., Bk. of Kentucky v. *Schuykill Bk. 1 Pars. Sel. Cases, 180.*

This case is analogous to that of the Pacific Rolling Mill Co. *v.* Dayton, S. & G. R. R. Co., 7 Sawyer, 61-69.

In that case the president was authorized by a resolution of the Board of Directors to execute a mortgage.

"As to the question—did the direction to the president "and secretary to make the mortgage of the corporation "to secure the payment of a specific sum, also authorize "them to insert a contract therein to pay an attorney's "fee to the mortgagee in case the same is sued upon. My "opinion is that it did not."

"They were the special agents to do a particular "thing—to execute a mortgage—and if they exceeded "this authority, their principal is not bound by it."

II.

The president being a special agent with a special authority, the assignment not being executed according

to the terms of the authority, was not the act of the company.

It is well settled that in cases of special agency the authority must be strictly pursued.

Martin vs. *Farnsworth, 49 N. Y., 558.*

III.

It cannot be claimed that the company has made the act of the president it own act of ratification.

There is no proof of acts done on the part of the company with full knowledge of the failure of the president to follow his authority, and ratification will not be presumed from lapse of time unless it is shown that the company had full knowledge of all the facts of the case.

Dabney v. *Stevens,* 10 *Abb. N. S.,* 39.
Owings v. *Hull,* 9 *Pet.,* 629.
Pacific R. M. v. *R. R.,* 7 *Sawyer,* 61-69.

Proof of knowledge must be shown.

Dabney v. *Stevens,* 10 *Abb. N. S., p.* 49, citing:
Blew v. *Bear River, &c., Co.,* 20 *Cal.,* 602.
Cumberland Coal Co. v. *Sherman,* 20 *Md.,* 117.

Point Fourth.

This is not a question of irregularity which the Company could waive, but a question of defect of title. If the president had no power to execute the assignment as he did, then the plaintiff obtained no title, and he cannot maintain this action, for his own proof discloses the defect of title.

"These cases clearly show that the description the "plaintiff gives himself as assignee of a bankrupt is re-

"garded as a substantial averment in the declaration, "and must be proved to entitle him to recover."

Best v. *Strong*, 2 *Wend.*, 325.

"And in the absence of proof to the contrary the law "also presumes against a debtor that the assignment of "the demand against him was made with due authority. "The transaction is open to inquiry, however, and upon "proof of want of authority or violation of duty or over- "stepping of power would be held void."

Belden v. *Meeker*, 47 *N. Y. at p.* 311.

In the case at bar the plaintiff's own proof shows an "over-stepping of authority."

Point Fifth.

The plaintiff cannot secure a reversal of this judgment upon the ground that there was any issue of fact which the Court should have submitted to the jury.

Counsel for both parties consented in open Court at the close of the case that there was no question of fact to be submitted to the jury (fol. 93). Each moved for the direction of a verdict in his own favor. It is now too late for the defeated party to claim that the Court erred in taking the case from the jury, and no such claim is made in the assignment of errors.

Bowen v. *Chase*, 98 *U. S.*, 254.
Richmond v. *Smith*, 15 *Wall.*, 429.

Point Sixth.

The judgment should be affirmed.

B. F. Tracy,
Attorney for Defendant in Error.

an estoppel be sustained against the denial of the upland owner that he has conveyed to his permissive improver. The courts which have often restrained intrusions of this kind, when objected to promptly would have supported such an estoppel; why, then, should not the legislature recognize it?

But I maintain that the statute did not and could not deprive the upland owner of his full right to move promptly in the courts for the removal of any obstruction to his access to the water, where it was placed there against his will, and under threats of force and violence, as the fact is admitted to be in this case, and that whenever such a state of facts exists any title derived from the State must be held in trust for the upland owner. Such cases are precisely within the principles of Atherton *v.* Fowler, 96 U. S. 513, and numerous other cases, where force, fraud, and the misconduct of officers have transferred lands patented by the United States to their rightful owners. Emphasis is laid upon the construction by the last paragraph of the section, where it is provided that nothing in the act shall apply to improvements made after the date of its passage; showing the legislative intention to discourage all scrambling possessions or claims not founded upon the upland owner's deed. Conceding, however, that the act was intended to apply to such a claim as the one at bar, it cannot be regarded in any other light than as showing the intention to make improvements alone the basis for the State's parting with its legal title, leaving the holders of adverse equities to resort to the courts for their enforcement. U. S. *v.* Schurz, 102 U. S. 378. And here the importance attached to a pleading of the facts in the answer appears. None of the material averments of the complaint were denied, for the allegations therein of the plaintiff's various rights were not material. If by nature the plaintiff had the rights claimed, it was not necessary to plead them, and the statute gave him the exclusive right to purchase. The answer was a confession and avoidance in the nature of a plea in bar. But the rules of equity pleading require that a plea in bar shall state the facts upon which the avoidance is claimed, so that the plaintiff may demur to the sufficiency of the facts as constituting a defense. Goodrich *v.* Pendleton, 3 Johns. Ch. 385; McCloskey *v.* Barr, 38 Fed. Rep. 165; Pumpelly *v.* Green Bay Co., 13 Wall. 175; Farley *v.* Kittson, 120 U. S. 303, 7 Sup. Ct. Rep. 534. This answer alleged that valuable improvements in actual use for commerce, trade, and business had been made upon said lands long prior to the 26th day of March, 1890, and that said improvements were on March 26, 1890, in actual use for commerce, trade, and business, and that the defendants were the owners of and in possession of such improvements. These allegations are all but legal conclusions. Poorman *v.* Mills, 35 Cal. 118; McCloskey *v.* Barr, *supra*. The decision says the demurrer admits the truth of these allegations. But a demurrer admits the truth of such facts only as are well pleaded, and not of mere conclusions of law. Of what could these improvements consist that would bring the defendants within the statute? It is clear that there were no docks, piers, wharves, or other conveniences of shipping,

because it is declared, in the sixth paragraph, to be the intention of the defendants to erect and maintain such structures in the future. This court says that they may not enlarge their present improvements; and their right to wharf out is precluded by the decision in Weber *v.* Commissioners, and by the fact that either the upland owner or some one else may buy the area in front of them to the harbor line. I conclude, therefore, that there is nothing in the Constitution or the statute which is hostile to the doctrine of riparian access and the right to wharf; that, if it is denied tentatively by section 1, art. 17, the proviso leaves it to the courts to say, whether, under the law, such rights exist; and that upon the pleadings the judgment should have been sustained.

The court has found that upon authority a riparian proprietor on the shore of the sea or its arms, has no rights, as against the State or its grantees, to continued access to the water, or to extend wharves in front of his land below high-water mark. In the language of Mr. Lewis, in his work on Eminent Domain (page 83) it has done so "by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the State or public;" and has not, as I conceive, accepted the great weight of authority both in England and America. To my mind, in reaching its conclusion, it has completely ignored the prime common source of the State's title, and of the riparian claim to access, which is that the navigable waters are natural public highways. Yet as compared with this matter of substance, all questions of reclamation of accretion and reliction, of fishery and seaweed, pale and fade into insignificance. It is as highways that the sovereignties of the world, and particularly our own, have any jurisdiction over the navigable waters, differing in any respect from their jurisdiction over the fast land, and their different jurisdiction is of precisely the same character as the jurisdiction over highways upon the land. Under the Constitution of the United States, Congress has the power to regulate commerce between the States and with foreign nations; but while under this power it has never yet undertaken to dictate concerning the manner of construction of any land highway not undertaken by itself, it has gone upon the water highways, both tide and fresh, and assumed the broadest control, deepening channels, changing harbors, building dikes, and regulating the building of bridges, in all of which it has been sustained by the Supreme Court of the United States, solely because the waters are natural highways. But it is at this point that the opponents of the riparian right of access make their strong stand, and where the forces of the parties for and against meet in final conflict; and that the court did not see fit to allude to this phase of the question is greatly to be regretted. For the real question involved here is not whether the owner of upland bordering upon the sea has any adverse claim to the soil under the water, as against the State, but whether, being upon his own fast land, he can step therefrom upon the public highway, and there, as a member of the public, enjoy the public right of passage.

In the case at bar, the appellants, possessing themselves of the exact line which borders the land and the highway, say to the landowner: "You can reach the water by yonder street, or, if you will wait until we have built a wharf here, you can pass over it at the same rate of toll as any other person. In the meantime you cannot pass at all." The appellants, however, in order to sustain their own position, are forced to maintain the very doctrine they fight against, that of the right of access. They oppose the upland owner's access, but, having planted themselves in the highway, they propose to build wharves and maintain access themselves. By their improvements they propose to turn the shallows into land, and then will claim that access to the water is necessary to its enjoyment. But here is land formed by nature, that since time was had no other outlet than over the sea, put there by nature as a highway. The land passed from the sovereign owner, by right of discovery the United States, by solemn patent, to the appellee, who is now told that the highway he relied upon is forever closed, without his consent and without any compensation for his loss. Has he been damaged? "Actually; oh, yes," will be admitted by his bitterest opponent; "but not in law, because the title to the land beneath this water is in the State." But wherein does the nature of the State's title to soil under navigable waters differ from that of its title to soil of a land highway? No writer or court that I have been able to consult points out the distinction, if there be one, except the subjection of the State's title in the submerged soil to the constitutional powers of Congress. If the purpose to be subserved by the States holding the two titles are identical, then, viz., the perpetuation of highways, it seems extremely difficult to argue on any secure or even plausible ground that the owner of land abutting on the sea has not the same right of access to and continuance of his highway as his neighbor who abuts upon a land highway. Certainly it is not necessary to argue what the rights of an abutter on a road or street are. The State, or its hand-maidens, the county, township, or municipal corporation, regulate and improve the way, but they cannot destroy it, or injure the abutter's direct access to it from every part of his frontage, without compensation. A late writer on this subject says: "'Once a highway, always a highway,' is an old maxim of the common law, to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position who have lawfully and in good faith invested or obtained property interests, in the just expectation of the continued existence of the highway, the maxim still holds good Not even the legislature can take away such rights without compensation." Elliot, Roads & S., p. 658.

To illustrate this by more explicit authority: It has long been settled that running a street railroad is a proper public use of a street, when built so as not to interfere unnecessarily with the public right to travel over it; and that the mere erection of such a structure on the surface of the street does not entitle an abutting owner to compensation, even when the fee of the street is in him. But in some large cities it became necessary to have

elevated railroads to carry on the traffic. These were authorized by the legislature of New York, with no provision for compensating abutters; and in a very recent case, where an elevated railroad had been built in front of his premises on Pearl street, an abutting owner sued the railroad company for damages. Abdendroth *v.* Railroad Co., (N. Y.) 25 N. E. Rep. 496. The court of appeals in its decision said: "The term abutting owner will be used in this judgment to denote a person having land bounded on the side by a public street, and having no title or estate in its bed or soil, and no interests or private rights in the street, except such as are incident to lots so situated. * * * There is no finding that the plaintiff, or any one of his predecessors, ever had any title to or estate in the land whereupon this street is maintained, or any interest except that of an abutting owner." The court then recalls numerous cases where abutting owners, both in city and country, in England and America, had been allowed special damages for obstructions in highways not opposite their land, and not authorized by legislative enactment, as well as several late cases in that State where the same principle had been upheld, where the obstruction was by legislative authority. Speaking of these last cases it says: "The judgments for damages which have been recovered and sustained against the elevated roads do not and cannot rest on the ground that the roads are public nuisances, for they were constructed pursuant to statute; and besides, as before stated, a public nuisance does not create a private cause of action, unless a private right exists and is specially injured by it. The only remaining ground upon which they can and do stand is that, by the common law the plaintiffs had private rights in the streets before the roads were built or authorized to be built. * * * The constitution of this State provides: 'Nor shall private property be taken for public use without just compensation.' It is settled by Story's Case, 90 N. Y. 122, and Lahr *v.* Railway Co., 104 N. Y. 268, 10 N. E. Rep. 528, that such rights as this plaintiff has in Pearl street are private property, within the meaning of the constitutional provision quoted. * * * It follows that the authority conferred by the legislature to construct the road is not a defense to the action." As will be seen, from the decision, so far as the public generally was concerned, no matter how great was the nuisance in the street, it could remain, because the legislature authorized it.

And, while I am so near the subject, I will here refer to the case of Hoboken *v.* Railroad Co., 124 U. S. 656, 8 Sup. Ct. Rep. 643, relied on by the court to sustain its decision; for the student of that case, it seems to me, must see that the only matter there in issue and decided was whether the State of New Jersey, as the superior of the city of Hoboken, could wholly destroy the public right of passage over filled-up lands at the end of a street, beyond the end of the street as originally dedicated. No private citizen was complaining, and the court says, on page 693, 124 U. S., and page 656, 8 Sup. Ct. Rep.: "The right insisted upon in these actions by the city of Hoboken is the public right, and not the right of individual

citizens claiming by virtue of conveyances of lots abutting on streets made by Stevens or his successors to the title. The public right represented by the plaintiff is subordinate to the State, and subject to its control. The State may release the obligation to the public, may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may do in that behalf conclusively binds the local authorities, when, as in the present cases, the rights of action asserted are based exclusively on the public right." And it might have added that the legislature of New Jersey could have altogether destroyed the corporation of Hoboken, but it could not touch the right of a single lot-owner, corporation or no corporation, to pass from his lot to the street, and thence abroad. The difficulty which the court finds in harmonizing Yates *v.* Milwaukee and the other leading cases in the United States Supreme Court with Hoboken *v.* Railroad Co., vanishes entirely when the right of the State to incumber a public highway, or to destroy it altogether, so far as the public right is concerned, is studied in connection with a case like that of Abendroth and the other New York elevated railroad cases, and the same principles are applied to both.

And now, the right to wharf is derived by strict analogy from the abutter's right in connection with a land highway; for no one questions the right of an abutter, where the improved roadway covers but a narrow strip in the middle of the way, to build for himself a convenient means to reach the traveled track over the intervening land; and so on the water-way, the navigable part of the water is the actual way, to which the wharf is the reasonable means of access. And as the right of access to the road pertains to every portion of the abutter's front, so the right to wharf belongs to all the riparian owner's front. I know it is said, in response to this, that the abutter cannot charge a toll to any member of the public who goes upon his sideway. Granted; but there is no question here of charging wharfage, which must be always reasonable, and is always under the public control. Transportation Co. *v.* Parkersburg, 107 U. S. 699, 2 Sup. Ct. Rep. 732. It was strongly intimated in Yates *v.* Milwaukee that whenever the water-way was made navigable up to the line of the upland owner's land, he could then no longer maintain his right to project his wharf. But, except in very contracted waters, the cheaper and more practical way is to build out the wharves, instead of deepening the water. The deprivation of these private rights by the state for its own public purposes, is the taking of property, whether on land or water, and must be compensated. Why, at this day, are these rights denied? I think this is the reason: Sometimes it happens that it is not necessary, for purposes of navigation, that the water-way should be as wide as nature has made it. Moreover, the waters have washed down the banks, and made shoals and flats, which can be filled up and made fast land, valuable for building, and even farming, purposes. The self-interest of upland owners has led them, in some instances, backed by their lawful riparian rights, to claim substantially the

whole beneficial use of the entire area from the high-water mark to the point of navigability, by which means, and the non-assertion of the State's rights, they have filled up the flats, excluded the water, and made land of the whole. In some States, as Rhode Island and Minnesota, this has been conceded to them as a right, and the public has received nothing for its complaisance. This is not justice. The protest against such a monopoly has, as often the case in such matters, overflown its proper bounds and gone to the extent of denying all riparian rights. But there is a middle course, which is the right one in my judgment, and which the courts ought to pursue, as leading to the law of these cases. I regret that the decision here adopted follows one of the extremes, and not the middle course.

I now come to consider the cases cited by the court as requiring its conclusion. Theoretically that is not "land" which is beneath navigable water; from the high-water mark all beyond is water. Grants of land stop at the margin, no matter how shallow or extensive may be the shoals beyond. Yet, although we do not endow the State as an ordinary landlord, we say that the title to the sea and river bottoms is in it. The State holds upland upon the same terms and with the same rights as a private citizen. We enforce this rule, even upon the Federal Government, in all but the matter of taxation and the right of eminent domain. There was a time when it was thought that the land beneath navigable waters belonged to the United States; but the Supreme Court in Pollard's Lessee *v.* Hagan awarded it to the several States. Yet in that great case (3 How. 229) the court said that Alabama held these submerged lands as a part of her sovereignty and jurisdiction, not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions; and that, "although the territorial limits of Alabama have extended her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, and the laws which shall be made in pursuance thereof." And it is worthy of note that the eminent counsel, who successfully presented that case for the defendant, said: "A right to the shore between high and low water mark is a sovereign right, not a proprietary one. Rivers do not pass by grant, but are an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in the State or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land which may be sold. Martin *v.* Waddell." I think there is a popular idea that Pollard's Lessee *v.* Hagan in some way involved the question of riparian rights. On the contrary, it was a contest between a patentee of tide flats from the United States, who was not an upland owner, and a squatter on the tide flats, who had no license whatever from the State of Alabama. The same repute is true of Martin *v.* Waddell, 16 Pet. 367. But the case was this: The titles to nearly or quite all the land in New Jersey came from the grantees of the Duke of York, to whom Charles II, in 1664, in consideration of the annual pay-

ment of forty beaver skins, gave a charter bestowing upon his royal brother the sovereignty and proprietorship of all the lands, bays, waters, rivers, soils, fisheries, etc., within a vast area. The duke immediately parcelled out his domain, under grants equally generous in their terms with that of the King to himself, and under one of these the proprietors of East Jersey became vested with all his rights in the lands and waters about Raritan bay. In 1702 the proprietors surrendered to Queen Anne the sovereignty only, and by the Revolution New Jersey became an independent State. The royal grants, however, were respected, and New Jersey had no public lands. The proprietors continued to make grants of lands to colonists, and, in a few instances, attempted to convey exclusive rights of fishing to individuals in certain defined areas of Raritan bay. In 1821 one Arnold, the possessor of such a fishery, sued one Mundy for trespass in entering the limits of his fishery and taking away oysters. The case was appealed on a judgment for defendant, and is reported in 6 N. J. Law, 1. The ground of the decision was that, although the King of England could by his royal charter, grant to a subject an indisputable title to any or all of the fast land, he could not and did not grant one inch of the soil beneath the waters to the Duke of York, because it belonged to the sovereignty, which was held in trust for the common public, and was returned to Queen Anne, to be devolved in turn upon the State of New Jersey. After stating some of the dispositions which the State might make of these soils, the court said: "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society make a direct and absolute grant of the waters of the State divesting all the citizens of their common right (of fishery). It would be a grievance which never could be long borne by a free people." In 1824 a statute of New Jersey gave to riparian owners the right to drive stakes in the waters of the bay, in front of their lands, to which to fasten nets, they not interfering with the navigation or any fishery. Waddell drove stakes accordingly, within the lines of a several fishery theretofore granted by the proprietors, and Martin, the grantee of the fishery, brought ejectment. The case resulted as did Arnold *v.* Mundy and reached the Supreme Court of the United States in 1842, where it was affirmed. The question here was, as in all cases of ejectment, upon the strength of plaintiff's title, and had no bearing whatever upon any riparian rights of the defendant; nor did the fact that the defendant had a license from the State cut any figure in the decision, and the result would have been the same without it. The court said: "From the opinion expressed in Blundell *v.* Catterall, 5 Barn and Ald. 287, and in Duke of Somerset *v.* Fogwell, 5 Barn & C. 883, the question whether since *Magna Charta* the King could grant to a subject a portion of the soil covered by the navigable waters of the kingdom so as to give him an immediate and exclusive right of fishery, either of shell fish or floating fish within the limits of his grant, must be regarded as settled in England against the right of the King." The case of Willson *v.*

Marsh Co., 2 Pet. 245, decided in 1829, merely held that in the absence of congressional legislation, the State of Delaware could authorize the damming of an inconsiderable, sluggish creek, for the purpose of facilitating the owners of its marshy shores in reclaiming them, so that the health of the community could be bettered; and that a citizen of another State could not complain of the obstruction. McCready *v.* Virginia, 94 U. S. 391, (1876) decided that a State held the tide waters, and the fish in them, for its own people, and not for the people of another State; and that a statute prohibiting the citizens of any other State from taking the fish was, "in effect nothing more than the regulation of the use by the people of their common property," and therefore no denial of the constitutional right that the citizens of each State have to all the immunities and privileges of citizens of the several States. Barney *v.* Keokuk, 94 U. S. 324, confirmed the claim of the State of Iowa to the title of the Mississippi to high-water mark; but, as the main point in the case held that one who has dedicated a street parallel to navigable water cuts himself off from riparian ownership and yields to the public, in this instance the city of Keokuk, the right to wharf out as an incident of the public use of the street, Barney's contention was that, as owner of the land to the middle of the river his dedication only extended to the water's edge, and that the filling beyond that line was a trespass on his land. It will be seen from the opinion of the court here that its decision is based mainly upon these United States Supreme Court cases. It is worthy of remark that they have not been so interpreted in any but a very small minority of the States; and the Supreme Court itself has never in a single instance based its ruling in a case, where the riparian right of wharfage was in issue, upon any State statute or ascertained custom or usage. In its most clearly cut decision (Yates *v.* Milwaukee) no such interpretation was allowed to interfere with its declaration of a riparian right of wharfage in Yates, although he was contending not only against the city of Milwaukee, but against the State of Wisconsin, which had chartered the city, to regulate the wharves on her water front, and herself to build and maintain such aids to navigation at the ends of streets. In Weber *v.* Commissioners, 18 Wall. 57, notwithstanding the language quoted by the court in its opinion, Judge Field distinctly and broadly announced the adherence of the Supreme Court to the doctrine of Yates *v.* Milwaukee, and showed that Weber was not a riparian owner. It is worth remembering at this point that San Francisco was the successor of a Mexican pueblo, and that the municipal corporation was the owner of all the land to high-water mark; so that when the State of California fixed the harbor line, and surrendered the tide lands within it to the city, it was making the surrender to a riparian owner. Hart *v.* Burnett, 15 Cal. 530.

Inasmuch as the cases above noted are chiefly relied upon to overcome the force of Dutton *v.* Strong, Yates *v.* Milwaukee, and Railroad Co. *v.* Schurmeir, and as none of them involved the matter

here in issue, I will briefly allude to these three cases, which it is agreed do touch the point. It is urged that there was a difference between the fresh-water rules and the salt-water rules; or that the upland owner had already built his wharf, presumably under State license; or that there was some unmentioned statute on which the court was relying, etc. But, if any such elements did enter into the consideration of those cases, the published decisions from syllabus to signatures, including briefs of counsel, fail to note the fact. Their declarations are broad and general, and, if we may rely on anything in judicial decisions, we ought to be able to do so here. Each of the cases was quoted in the succeeding ones, and all have been cited often and again by the Supreme Court, and by almost every Federal and State court. Yates *v.* Milwaukee is the leader, and that was a case in which the State's authority was indirectly, but very materially, in question. So in Railroad Co. *v.* Schurmeir the defendant had the State's title to the land over which the plaintiff claimed to exercise his right of access. Since those decisions there is, I believe, not a single case in the Federal or State reports where the principles therein laid down are doubted or departed from. On the contrary, they have been often cited always to the effect contended for here, and to the frequent overruling of contrary holdings. It is the same with the law-writers who have embraced this subject in their works, with a single exception. I mention this, not as arguing that numbers make the law, but to show that the profession has not understood those decisions to have been pronounced with any of the qualifications and reservations insinuated here; and I conclude with the proposition, taken from these cases and never denied by the Supreme Court of the United States, that a riparian owner on the seashore has a natural right of access, and a right to construct a landing, wharf, or pier, for his own use, or for the use of the public, which is a vested right, or appurtenance to his land, under the common law of real property as it exists in the United States, without any reference to statutory license or customary usage. In support of this position I cite Ang. Tide Waters, 24 *et seq.*, 224 *et seq.;* Cooley, Const. Lim. (5th ed.) p. 675, note 1; Ang. Water Courses, (7th ed.) 732; 3 Washb. Real Prop. (5th ed.) 445; Gould, Waters §§ 148–154; Lewis, Em. Dom. §§ 77–83; Dill. Mun. Corp. (4th ed.) § 106; Washb. Easem. (4th ed.) 324; Houck, Rivers, §§ 280, 281; 6 Amer. & Eng. Enc. Law, 558; 28 Myers' Fed. Dec., tit. "Riparian and Littoral Proprietors;" 3 Kent. Comm. (13th ed.) p. 413 note; Kerr, Inj., pp. 264, 265. Mr. Wood, in his Law of Nuisances, is, I believe, the only modern text-book writer who maintains the opposite ground. But this author does not attempt to misconstrue Yates *v.* Milwaukee, or find excuses for this ruling. On the contrary, he attacks it boldly, characterizing the language of it as "mere dictum," and declares the principle established by it as "wholly unsustained by any authority." We are not accustomed to thus lightly treat decisions of that great court, but the attack thus made is admirable for its audacity. Lyon *v.* Fishmongers' Co., 17 Moak, Eng. R., 51,

is also explained away by this court as never before. Mr. Wood found no explanation. He quotes at length from the opinions of Lords Cairns, Chelmsford, and Selborne, and then says: "Thus it will be seen that there is considerable conflict upon the question discussed in the note, but while we believe that the doctrines advanced in this case are utterly fallacious, and unsustained in principle as they are upon authority, it will not be profitable to pursue the matter further; but, as it is the business of an author to give the law as he finds it, I have felt constrained to give the leading portions of the opinions of the lords justices in the case, that the question may be fairly presented." I take it that the author "gives the law as he finds it." When he quotes the opinion of the two highest courts of the civilized world, although he personally does not agree with the correctness of their decision.

The court assumes that, inasmuch as many of the States have long had statutes regulating the riparian owner's exercise of his right of wharfage, and in many instances enlarging it, therefore his right rests entirely upon the statute of his State. I do not see why it should be so regarded, since we constantly find what has always been the law enacted into statutory form; and we might as consistently say that the State's title to the tide and shore lands is dependent solely upon article 17 of the Constitution. It is sufficient to say that the courts of the States alluded to have not taken any such position, and I shall now cite some cases showing this to be the fact. One of the oldest of these statutes is that of Maryland, in 1745; but in Railroad Co. *v.* Chase, 43 Md. 23, the court said:

"These riparian rights (of accretion and wharfage) founded on the common law, are property, and are valuable; and, while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or impaired. They are rights of which, once vested, the owner can only be deprived in accordance with the law of the land, and if necessary that they be taken for public use upon due compensation;" citing Yates *v.* Milwaukee. In New York, although for many years the courts have been handicapped by Gould *v.* Railroad Co., as a settled rule of property, in Mayor etc., *v.* Hart, 95 N. Y. 443, the court said: "But it shocks every notion of justice and right to say that the riparian owner upon navigable water has no equities by reason of that ownership. It is a doctrine which is repudiated by the entire legislation of our State. Granting, as has been held, that the riparian owner has no legal or equitable right enforceable as such against the public right, it is nevertheless true that out of this situation upon the banks, and the convenience and benefit of the water front, he suffers peculiar damage and individual injury when cut off by public use. * * * And whenever and wherever the State has granted to the city of New York exterior lands, under water, it has accompanied the grant with pre-emptive rights to the adjacent owners. It is idle to say that all this has been done of pure grace, and without any equity in the abutters. There was reason for doing it, and justice in the act." If stronger language was needed to

show that the New York court of appeals would now overturn Gould *v.* Railroad Co., if it could, it is to be found in Rumsey *v.* Railroad Co., 114 N. Y. 423, 21 N. E. Rep. 1066 and 25 N. E. Rep. 1080. Rhode Island has always maintained the doctrine contended for without reference to any statute. Providence Steam-Engine Co. *v.* Providence etc., S. S. Co., 12 R. I. 348; Clark *v.* Peckham, 10 R. I. 35. Connecticut in like manner. Simons *v.* French, 25 Conn. 346; State *v.* Sargent, 45 Conn. 358. This case contains an eminently fair discussion of the powers of the State. In New Jersey the courts maintained the rule until Stevens *v.* Railroad Co., 34 N. J. Law, 532 (see Keyport, etc., Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 516; Gough *v.* Bell, 22 N. J. Law 441; Bell *v.* Gough, 23 N. J. Law, 624) when in a long discussion, not in anywise necessary to the decision of the case, the court announced that riparian owners had no rights which could be injured by the State, but at the same time sustained a judgment for injuries of precisely the character discussed in all essential parts. The decision on the main point, for which the case is celebrated, was based on the English case of Duke of Buccleuch *v.* Board of Works, L. R. 5 Exch. 221, which was reversed afterwards in the House of Lords, (L. R. 5 H. L. 418,) and still further overthrown by Lyon *v.* Fishmongers' Co., 17 Moak, Eng. R. 51, on the very point relied on. The legislature of New Jersey immediately amended the wrong done by this decision by its act of 1869. Fishing Co. *v.* Carter, 61 Pa. St. 21, says: "The State can grant authority to make such erections (of structures below high water) either to the riparian owner or to others, so long as the riparian owner is not thereby deprived of access to and the use of the river as a public highway, which is implied, if not expressed, in the grant to him of the land bounded on the stream." In North Carolina, Bond *v.* Wool, 12 S. E. Rep., 281, is the latest of several cases on this subject, and there the court said: "In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage belonging by nature to their land; the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers or landings, subject to such general rules and regulations as the legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers or navigable water."

It will be said that the phrase, "in the absence of any special legislation on the subject," means, "unless there be special legislation otherwise;" but it is not so. The sense is, "without any legislation to that effect," and the decision shows it. Bond *v.* Wool is supported by decisions in other States, old and new in numerous cases, of which I mention one or more in each, viz: In Michigan: Rice *v.* Ruddiman, 10 Mich. 125; Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. Rep. 103. In Indiana: Bainbridge *v.* Sherlock, 29 Ind. 364. In Wisconsin: Delaplaine *v.* Railroad Co., 42 Wis. 214. In Minnesota: Brisbine *v.* Railroad Co., 23 Minn. 114. In Missouri:

Meyers *v.* St. Louis, 8 Mo. App. 266, affirmed, 82 Mo. 367. In Illinois: Railroad Co. *v.* Stein, 75 Ill. 41. In Kentucky: Thurman *v.* Morrison, 14 B. Mon. 296. In Ohio: Hickok *v.* Hine, 23 Ohio St. 523. In Arkansas: Organ *v.* Railroad Co., 11 S. W. Rep. 103, and cases cited. In California: Shirley *v.* Bishop, 67 Cal. 543, 8 Pac. Rep. 82. In Oregon: Wilson *v.* Welch, 12 Or. 353, 7 Pac. Rep. 341; Parker *v.* Packing Co., 17 Or. 510, 21 Pac. Rep. 822.

Of these States, at least Missouri, Kentucky, Arkansas, North Carolina, California, and Oregon stop the upland title at high-water mark. Cases to the same undoubted effect in the United States courts are: Bowman *v.* Wathen, (Ind.) 2 McLean, 376; Packet Co. *v.* Atlee, (Iowa) 2 Dill., 479, affirmed, 21 Wall. 389; State *v.* Railway Co., 33 Fed. Rep. 730; Hollingsworth *v.* Parish of Tensas, 17 Fed. Rep. 113; Rutz *v.* St. Louis, (Mo.) 3 McCrary, 261; Transportation Co. *v.* Parkersburg, 107 U. S. 699, 2 Sup. Ct. Rep. 732; Potomac Steamboat Co. *v.* Upper Potomac Steamboat Co., 109 U. S. 672, 3 Sup. Ct. Rep. 445. In Van Dolsen *v.* Mayor, 17 Fed. Rep. 817, decided in 1883, the facts were precisely those of the case at bar, and after considering all of the cases, both English, State, and Federal, the court holds that the New York elevated railroad cases are decisive of the law in that State, since there is no difference between the principles applying to the land-way and the water-way; and, further, that in view of Yates *v.* Milwaukee, Lyon *v.* Fishmongers' Co., and other like cases, Gould *v.* Railroad Co., 6 N. Y. 523; Stevens *v.* Railroad Co., 34 N. J. Law, 532; Lansing *v.* Smith, 4 Wend. 9; and Furman *v.* Mayor, etc., 10 N. Y. 567, are no longer to be regarded as controlling. There the lessee of the riparian owner sought an injunction to prevent the city of New York, which was the owner of the land between high and low water, from filling up the flat and obstructing the way, and was held to be entitled to the relief asked.

This court, I think, misreads the case of Lyon *v.* Fishmongers' Co., when it gives importance to the term "privilege," as though the rights sustained in Lyon were a concession of statute or usage merely. On the contrary, each of the lords who delivered an opinion was pronouncedly clear that the right was by nature. Said Lord Selborne: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has, by nature, the advantage of being washed by the stream; and, if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. * * * Even if it could be shown that the riparian rights of the proprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of the opinion that he had a right to the river frontage belonging by nature to his land, although the only practical advantage of it might consist in the access thereby afforded him to the water, and the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue and in respect of his riparian property; it is wholly distinct from the public right of navigation."

No other State court has interpreted this case, and the opinions of the judges to mean anything but what they say; and a very high English authority, the Encyclopedia Britannica, cites the case in the concluding words of its article on riparian laws in this way: "It should be noticed that rights of the public may be subject to private rights. When the river is navigable, although the right of navigation is common to the subject of the realm, it may be connected with a right to exclusive access to riparian land, the invasion of which may form the ground for legal proceedings by the riparian proprietor." Says Judge Dillon, in his Municipal Corporations, § 106: "By the common law the riparian owner has the right to establish a wharf on his own soil, this being a lawful use of the land. The right is judicially recognized in this country, and riparian owners on ocean, lake, or navigable rivers have, in virtue of their proprietorship, and without special legislative authority the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the State for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country."

The idea of "purpresture" furnishes forth a great difficulty in the mind of the court. There is a short and comprehensive history of that portentous institution in People *v.* Davidson, 30 Cal., 379, from which it appears to be not much more than an ancient prerogative ghost, whose original substance has been completely emasculated by the later law. Suffice it to say that whether the doctrine of purpresture, as applied to wharves extended by riparian owners, has any force in this country or not, it never, in its palmiest days, had the effect of permitting the King to shut off the riparian owner of land from access to the sea by an obstruction of any kind placed in the highway, which is the real ultimate point in issue in this case.

In conclusion, I recur to the act of 1854, to remark that if that act is to be taken as now repealed, and if riparian owners have not the natural right of access and wharfage, then there is not, in the State of Washington, any authority under which the slightest convenience can be erected or maintained in aid of navigation, excepting in front of incorporated towns; and all the accumulations of labor and wealth, already expended by private enterprise in building up a commerce second to none in present importance and future promise, are laid at the mercy of a public policy which has not seen its equal since men began to "go down in ships." For what? To maintain an idea of "legal title" and royal sovereignty which has been repudiated for generations, and which now at this day says to the common people of Washington: "The shores of your great inland sea, and of your hundred rivers, are walled in by the State until such time as, after survey, appraisement, contests, slow legislative proceedings, and what not, the speculator on your necessities shall have loaded himself with tide-land patents, and fattened with your fees for crossing his land." The simple logger may not roll

the hard-won product of his toil down the slope of his land, and into the water, because some shrewd watcher of the land office has bought the shore while his back was turned. This is making the waters a public highway with a vengeance. But the illustration is just because it refers to the very use made every day of our shores in hundreds of places without wharves, docks, or piers, and where there is no question of purpresture, but only the right of access is availed of. It involves the principle of the case in homely practical form. Conceiving that no such conclusions were necessarily involved in the constitution or the statute, I dissent from the idea that any such policy was intended to be adopted, even though it were lawful to do so.